CH. 52
TRIAL PROCEDURES

Top

§52-1
Public Trials

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) The Sixth Amendment right to a public trial is applicable to State proceedings.

Nixon v. Warner Communications, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) Under the First Amendment, the press generally has no right to information about a trial that is superior to the right of the general public. In addition, the Sixth Amendment right to a public trial does not require that any part of a trial be broadcast live or on tape. The requirement of a public trial is satisfied by the opportunity of members of the public and press to attend the trial and report what they have observed.

Richmond Newspaper v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) Before the start of defendant's fourth trial for murder (his conviction after the first trial was reversed on appeal and the second and third trials ended in mistrials), defense counsel moved to close the trial to the public and press. The prosecutor had no objection to the closing, and the trial judge excluded the public and press from the courtroom during trial.

The Supreme Court reversed the exclusion, holding that the public and the press have a right under the First and Fourteenth Amendments to attend criminal trials. Although the Court did not set out the circumstances in which all or part of a criminal trial may be closed, it held that closure was error here because the trial judge made no findings to support the closure, no inquiry was made into alternative solutions, and the trial judge did not recognize the constitutional right of the public and press to attend the trial. "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."

Press-Enterprise v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) There is a qualified right of public access to preliminary hearings. Such hearings cannot be closed to the public unless the trial court makes specific, on-the-record findings that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." If the interest involved is the right of defendant to a fair trial, the findings must demonstrate a substantial probability of prejudice from publicity, that closure will prevent such prejudice, and that reasonable alternatives to closure would be inadequate.

Gannett v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) The Sixth Amendment confers the right to a public trial only upon a criminal defendant; members of the public have no constitutional right, under the Sixth or Fourteenth Amendments, to attend criminal trials. Thus, the trial judge properly excluded the press and public from a pretrial proceeding where defendant, the prosecutor, and the trial judge all agreed to the closure to assure a fair trial. The closure here was proper because: the spectators failed to object when the closure motion was made, the trial judge balanced the rights of the public against defendant's right to a fair trial and found that an open hearing would present "a reasonable probability of prejudice" to defendant, and the denial of access was only temporary.

Press-Enterprise v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) The guarantee of open proceedings in criminal trials applies to voir dire. Thus, before closing voir dire to the press and public, the trial court must make specific findings that an open proceeding threatens defendant's right to a fair trial and prospective jurors' rights to privacy, and must consider whether alternatives to a closed proceeding are available.

Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) A defendant's right to a public trial applies to a hearing on a motion to suppress evidence.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) The Supreme Court reversed a state court order prohibiting the news media from reporting the existence and nature of confessions or admissions by defendant and other facts "strongly implicative" of the accused, including information obtained in open court. Although the guarantee of freedom of expression is not absolute, a "heavy burden" is imposed before a prior restraint can be issued against the media. Here, the trial court's conclusions concerning the impact of publicity on prospective jurors were speculative and there was no finding that alternative measures would have been insufficient to protect the rights of the accused. In addition, it was unclear that even the prior restraint ordered by the trial court would effectively protect defendant's rights. Finally, the portion of the order restraining publication of facts "strongly implicative" of the accused was unconstitutionally vague and overbroad.

Globe Newspapers v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) The First Amendment was violated by a state statute requiring that the press and public be excluded during the testimony of minor victims of rape and sexual assault. Although the right of access to criminal trials is not absolute, the press and public may be excluded only in limited circumstances where the State shows such exclusion "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."

Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) The Federal Constitution does not prohibit all photographic, radio, and television coverage of state criminal trials. Compare, Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

Carey v. Musladin, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006) The Supreme Court has never considered whether the conduct of private citizens (i.e., wearing buttons with the decedent's picture at a murder trial) can deny a fair trial.

People v. Kirilenko, 1 Ill.2d 90, 115 N.E.2d 297 (1953) "It is a fundamental concept both under our constitution and our criminal code that a defendant in a criminal proceeding has a right to a public trial . . . at every stage of which he has the right to be present and in every part of which he has a right to participate."

People v. Holveck, 141 Ill.2d 84, 565 N.E.2d 919 (1990) Ch. 38, ¶115-11 (725 ILCS 5/115-11) permits a trial judge to exclude from the courtroom, during the testimony of a sex offense victim under 13 years of age (now 18 years of age), all persons other than the media who do not have a direct interest in the cause. The trial judge did not err by invoking ¶115-11 during the testimony of five- and six-year-old complainants where the jury was informed of the reasons for the closure, the judge based his decision on the effects on young children of testifying in the presence of a large number of people, and the judge considered the interests of both defendant and the witnesses. See also, People v. Falaster, 173 Ill.2d 220, 670 N.E.2d 624 (1996) (order excluding persons with no direct interest in the case, under §115-11, is not subject to U.S. Supreme Court precedent governing closure of trial to media and public).

People ex rel. Woodward v. Oliver, 25 Ill.App.3d 66, 322 N.E.2d 240 (2d Dist. 1975) The right to a public trial is not infringed by in camera discussions.

People v. Garrett, 264 Ill.App.3d 1089, 637 N.E.2d 615 (1st Dist. 1994) At defendant's trial for criminal sexual assault and aggravated criminal sexual abuse of the daughter of his live-in girlfriend, the State moved

to exclude defendant's parents from the courtroom while the 15-year-old complainant testified, claiming that the complainant's "emotional well-being" would be adversely affected by their presence. The trial judge expressed skepticism as to the prosecutor's claims, but concluded that "based on your representation" the motion should be granted.

The trial judge erred. The right to a public trial may be abrogated only in "rare" cases where there is an "overriding interest." Closure must be both essential and "narrowly tailored to serve that interest." Where the State claims such an "overriding interest," the trial court must decide whether the interest is legitimate and whether closure is essential to protect it. The trial court must also consider whether reasonable alternatives to closure would sufficiently protect the interest, and the failure to consider reasonable alternatives renders a closure order void.

Also, the exclusion was not justified under Ch. 38, ¶115-11 (725 ILCS 5/115-11), which allows the trial court to exclude persons who do not have a "direct interest" in the proceedings. In light of the presumption of innocence, the parents of a defendant have at least as "direct" an interest in a case as does the family of a complainant.

People v. Latimore, 33 Ill.App.3d 812, 342 N.E.2d 209 (5th Dist. 1975) Defendant's right to a public trial was not violated by order excluding all spectators except the news media and persons with a "specific interest" during rape victim's testimony.

People v. Taylor, 244 Ill.App.3d 460, 612 N.E.2d 543 (2d Dist. 1993) Exclusion of defendant's family members from courtroom during voir dire, because trial court did not want to take chance that a spectator might make a prejudicial comment, violated defendant's Sixth Amendment right to a public trial.

The right to a public trial includes all aspects of the trial, including voir dire. Before ordering either total or partial closure of a trial, the trial court must find an overriding State interest that is likely to be prejudiced by non-closure, the closure must be no broader than required to protect that interest, reasonable alternatives must be considered, and adequate factual findings must be made.

Although protecting the jury venire from prejudice might qualify as an overriding interest, there was no evidence that such an interest would be prejudiced if defendant's siblings were present. Instead, the trial judge indicated that he regularly excluded defendants' family members from trials to exclude any possibility of prejudice. Such a practice cannot overcome the presumption that a trial is to be open to the public, especially where there is no supporting evidence in the particular case at bar.

The appropriate remedy was to remand the cause for a new trial without requiring defendant to show any specific prejudice. See also, **People v. Willis**, 274 Ill.App.3d 551, 654 N.E.2d 571 (1st Dist. 1995) (trial court failed to make sufficient findings to justify exclusion of defendant's family; closure could not be justified by threats against and payments to a witness, because the trial court was not aware of that evidence when closure was ordered).

People v. Lawrence, 268 Ill.App.3d 327, 644 N.E.2d 19 (1st Dist. 1994) At defendant's trial for murder and concealment of a homicidal death, the trial court interrupted the State's rebuttal argument to announce that it had inadvertently turned off the microphone that transmitted the proceedings to the gallery, which was separated from the courtroom by a heavy glass barrier. Defendant's failure to object or ask that the State repeat its argument waived any claim that the Sixth Amendment had been violated.

In re Manuel M., 2017 IL App (1st) 162381 (No. 1-16-2381, 1/6/17)

Both the federal and Illinois constitutions guarantee a defendant the right to a public trial, including the right to appear and participate in person or by counsel at all stages of the proceedings involving substantial rights. U.S. Const. amend. VI; Ill. Const. 1970, art. I, §8. The denial of a defendant's right to a

public trial constitutes a structural error and necessarily renders the trial fundamentally unfair or an unreliable means of determining guilt of innocence. When such errors occur, automatic reversal is required.

Police officers have a qualified privilege from disclosing surveillance locations in criminal proceedings. In deciding whether the privilege applies, courts must balance the public interest in keeping the location secret against the defendant's right to test the credibility of the witness through cross-examination. In making its decision, the trial court may conduct an *in camera* examination of the officer out of the presence of defendant and his counsel.

A police officer went to a surveillance location near a park and using binoculars observed defendant flashing gang signs at passing cars, causing them to swerve into oncoming traffic and creating a dangerous situation. The officer then drove to the park, arrested defendant, and while patting him down recovered a gun.

On cross-examination, defense counsel asked the officer to disclose the exact surveillance location. The State objected that disclosing the location would endanger officer safety. The trial court elected to conduct an *in camera* examination of the officer. Defendant and his counsel were excluded from the examination, but the prosecution was allowed to be present. The trial court examined the officer and ascertained the exact surveillance location. The prosecutor was allowed to question the officer and to argue that the location should be kept secret. The trial court ruled that the officer did not need to reveal his surveillance location.

The Court held that the *in camera* examination of the surveillance officer should have taken place outside the presence of both the State and the defense. And the *in camera* proceeding should have been limited to disclosure of the exact location of the surveillance. Any testimony or argument addressing the public interest to be protected by nondisclosure should have been made in open court. Allowing the State to examine the officer in a proceeding outside the presence of defendant and his counsel violated defendant's right of confrontation and his right to a public trial.

The delinquency adjudication was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Gavin Dow, Chicago.)

People v. Evans, 2016 IL App (1st) 142190 (No. 1-14-2190, 12/13/16)

1. The Sixth Amendment right to a public trial extends to *voir dire* of prospective jurors. A violation of the right to a public trial is a structural error which requires automatic reversal without any showing of prejudice. An error may be designated as structural only if it renders the trial fundamentally unfair or unreliable as a means of determining guilt or innocence.

To justify closing a proceeding to the public, there must be an overriding interest that is likely to be prejudiced if the hearing is open, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closure, and the court must make adequate findings to support the closure.

2. Here, defendant's step-grandmother was removed from the courtroom during *voir dire*. The judge stated that because there were 45 prospective jurors there was a shortage of seats in the courtroom, and that it was impossible to separate the grandmother from the prospective jurors.

The Appellate Court assumed that avoiding juror contamination is an overriding interest, but found that excluding the grandmother from the proceedings was not necessary to protect that interest. There was no evidence that the grandmother had attempted or would attempt to communicate with prospective jurors, and defense counsel stated that he had instructed the grandmother not to communicate with the jury pool. Under these circumstances there was no specific threat of jury contamination sufficient to justify closing the proceeding.

The Appellate Court also found that the second reason for barring the grandmother - that there were a limited number of seats available in the courtroom - carried even less weight. Having 45 potential jurors sit in the courtroom at one time is solely a matter of logistics and convenience, and does not affect the fairness of the trial. Many courtrooms are undersized, but "even in a cramped physical space" trial courts can deal with space limitations in ways that do not burden the right to a public trial. For example, potential jurors

can be called into the room in smaller groups, the grandmother or a potential juror could have been asked to stand until a seat became available, and the jurors and the grandmother could have been instructed not to interact.

In addition, the trial court failed to make adequate findings to support the closure where it referred only to the small size of the courtroom and made no finding that the grandmother was likely to contaminate the venire. Although a trivial temporary closure might not violate the Sixth Amendment, the exclusion of the grandmother from the entire jury selection could not be deemed to be trivial.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Elena Penick, Elgin.)

People v. Goods, 2016 IL App (1st) 140511 (No. 1-14-0511, 9/12/16)

The federal constitution guarantees a public trial as a restraint on the possible abuse of judicial power. But the presumption of openness may be overcome where closure is essential to preserve higher values.

At his sentencing hearing, defendant asked to present certain mitigating evidence regarding his cooperation with the State *in camera* since he feared for his safety if he were to be labeled a "snitch." The trial court denied the request, stating that it could not hear such evidence *in camera* unless there was a statute permitting it.

In a case of first impression in Illinois. the Appellate Court held that the trial court erred in not allowing defendant to present his mitigation *in camera*. The court held that a defendant should be allowed to present mitigation *in camera* when he shows good cause for doing so. Here defendant's concern for his safety showed good cause. The trial court was essentially asking defendant to choose between his safety and his ability to present mitigation. Defendant was thus denied a fair hearing.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Jones, 2014 IL App (1st) 120927 (No. 1-12-0927, 3/24/14)

1. The Sixth Amendment guarantee to a public trial is designed for the protection of the accused, and is intended to: (1) ensure a fair trial; (2) encourage the prosecution and trial court to carry out their duties responsibly; (3) encourage witnesses to come forward; and (4) discourage perjury. The right to a public trial includes the right to a public *voir dire*.

The right to a public trial is not absolute, however, and can be infringed when necessary. In addition, a temporary closure may be so trivial that it does not violate the Sixth Amendment. This "triviality standard" is not a harmless error analysis, however. Instead, it examines the trial court's actions and the effects of the closure to determine whether Sixth Amendment protection was denied.

2. Plain error did not occur where *voir dire* of three veniremembers occurred in chambers, outside the presence of the public and the defendant. First, Supreme Court Rules 431 and 234 grant the trial court discretion to conduct *voir dire* outside the presence of other jury members. Second, because access to *voir dire* was not requested by defendant, the news media, or the public, the procedure merely prevented other members of the *voir dire* panel from hearing the responses. The right to a public trial does not require that all veniremembers hear other veniremembers' answers.

The court also noted that one of the prospective jurors requested an *in camera* discussion, and there was nothing in the record to indicate that the trial was in any way unfair due to the brief *in camera* questioning, especially since all three of the prospective jurors questioned *in camera* were excused from the jury. Because any closure was trivial, no Sixth Amendment violation occurred.

3. The court rejected defendant's argument that he was not required to object in order to avoid waiving any issue concerning the *voir dire*. United States Supreme Court case law holds that where the defendant objects in the trial court to the closure of a trial, the court must consider alternatives to closure even where neither party offers any alternatives. Where there is no objection to the closure, however, the issue is forfeited.

Defendant's conviction for first degree murder was affirmed.
(Defendant was represented by Assistant Defender James Morrissey, Chicago.)

Top

§52-2
Defendant's Right to be Present

§52-2(a)
Generally

Synder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934) Defendant did not have the right to be present when the jury was taken to view the crime scene. Defendant has the right to be present whenever his presence has a reasonably substantial relation to the fullness of his opportunity to defend against the charges and to confront and cross-examine the witnesses against him. See also, **People v. Devin**, 93 Ill.2d 326, 444 N.E.2d 102 (1982) (defendant's absence from viewing of premises was not error).

Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) A defendant can lose his right to be present at trial if, after he has been warned that he will be removed if he continues his disruptive behavior, he conducts himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot continue.

Portuoendo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) Prosecutorial argument that defendant was the only witness who had been allowed to remain in the courtroom while the other witnesses testified, and that he therefore could "tailor" his testimony to fit the evidence, did not improperly comment on defendant's constitutional rights to attend his trial, confront witnesses, and testify in his own behalf.

People v. Mallet, 30 Ill.2d 136, 195 N.E.2d 687 (1964) A defendant has an absolute right to be personally present at all stages of his trial. This right may be waived by defendant, but not by defense counsel.

People v. Peeples, 205 Ill.2d 480, 793 N.E.2d 641 (2002) Defendant's absence from a portion of jury selection violates due process only if the absence results in denial of a fair trial. To establish a violation of due process, defendant must show that the jury which convicted him was prejudiced. Although three of the fifteen jurors questioned outside defendant's presence ultimately sat on the jury, the record contained no indication that they were prejudiced.

People v. Bull, 185 Ill.2d 179, 705 N.E.2d 824 (1998) Because there was no reason to believe that defendant was tried, convicted and sentenced by a jury who was prejudiced against him, no reversible error occurred despite defendant's exclusion from voir dire during the questioning of a juror who, after being selected for the jury, was told by a friend that defendant had "done this before."

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) During jury selection, the trial judge questioned and excused for cause two sworn jurors and one prospective juror. Although defense counsel, the prosecutor and the court reporter were present, defendant was absent. The trial judge erred by conducting the proceedings in defendant's absence.

People v. Woods, 27 Ill.2d 393, 189 N.E.2d 293 (1963) The right of a defendant to be present at trial is not violated unless the hearings held outside defendant's presence involve "substantial rights." An uncontested

motion for a continuance did not require defendant's presence.

People v. Lofton, 194 Ill.2d 40, 740 N.E.2d 782 (2000) Defendant is entitled to attend a hearing on a 725 ILCS 5/115-10 motion to admit hearsay statements by the child victim of specified sexual offenses.

People v. Keene, 169 Ill.2d 1, 660 N.E.2d 901 (1995) The Sixth Amendment right to confrontation guarantees only that criminal defendants have the right to confront witnesses at trial. The right to confrontation is not violated by a defendant's absence from a hearing (voir dire of a witness) that takes place outside the jury's presence.

Furthermore, due process requires that a criminal defendant be allowed to attend an out-of-court hearing that "might bear a 'substantial relation' to the defense effort at trial." Although the hearing here concerned the witness's upcoming testimony, it had no "substantial relationship" to the defense effort at trial; defendant could have reviewed the transcript of the witness's *voir dire*, and the evidence that was discussed had been previously disclosed to the defense.

People v. Martine, 106 Ill.2d 429, 478 N.E.2d 262 (1985) Defendant waived her right to be present where neither she nor defense counsel objected when she was removed from the courtroom during an offer of proof and legal argument. Although there appeared to be no valid reason for defendant to be removed, she was not deprived of the opportunity to hear testimony or confront the witnesses.

People v. Nielson, 187 Ill.2d 271, 718 N.E.2d 131 (1999) Although defendant has a constitutional right to attend his capital sentencing hearing, that right can be knowingly and voluntarily waived. By confirming on at least four occasions that he did not want to attend the hearing and by threatening to disrupt the proceedings if forced to remain, defendant waived his right to be present. 725 ILCS 5/115-4.1(a), which holds that the trial in a capital case may proceed in defendant's absence if the State certifies that it will not seek a death sentence, refers only to defendants who absent themselves before trial.

People v. Brindly, 369 Ill. 486, 17 N.E.2d 218 (1938) Defendant's presence in court must affirmatively appear from the record. It was improper to conduct important matters of procedure, such as swearing in the jury, in defendant's absence.

People v. Davis, 39 Ill.2d 325, 235 N.E.2d 634 (1968) It was constitutionally impermissible to hold a felony trial at which defendant was neither present nor represented by counsel.

People v. Pierce, 56 Ill.2d 361, 308 N.E.2d 577 (1974) Defendant's right to be present at trial was not violated where trial judge refused to respond to a request from the jury.

People v. Myles, 86 Ill.2d 260, 427 N.E.2d 59 (1981) Defendant was not denied a fair trial where he was excluded from the courtroom during testimony and brought to the doorway (to be identified by a witness) while dressed only in his underwear.

First, defendant was properly removed from the courtroom because he interrupted the State's case and indicated that he did not intend to remain silent. Second, the deputy sheriffs attempted to fully dress defendant before he was taken into the courtroom for the identification, but defendant removed his clothing and resisted attempts to dress him.

People v. Burnett, 385 Ill.App.3d 610, 897 N.E.2d 827 (1st Dist. 2008) There are two lines of authority concerning the absence of defendant and counsel from critical stages of the proceedings. Under **People v. Childs**, 159 Ill.2d 217, 636 N.E.2d 534 (1994) and its progeny, the State has the burden to prove beyond a reasonable doubt that defendant's absence from a critical stage of the proceeding was harmless. By contrast,

under **People v. Bean**, 137 Ill.2d 64, 560 N.E.2d 258 (1990) and its progeny, defendant may obtain a new hearing only if he can show that his absence resulted in an unfair proceeding which denied him a substantial right such as the right to confrontation, the right to present a defense, or the right to an impartial jury.

Under either standard, defendant was not entitled to reversal where his motion to reconsider sentence was denied while neither he nor his attorney were present. If the burden was on defendant to show that his constitutional rights were violated, he could not do so where the motion to reconsider raised no factual allegations other than those which had been brought up at sentencing, and merely asked the trial court to reevaluate those factors. On the other hand, if the burden was on the State to establish beyond a reasonable doubt that the error caused no harm, the State meet that burden where the motion to reconsider did not seek to present any new evidence.

People v. Lindsey, 201 Ill.2d 45, 772 N.E.2d 1268 (2002) Defendant's appearance by closed-circuit television at his arraignment and jury waiver did not create an unfair proceeding or deny any substantial constitutional right.

725 ILCS 5/106D-1(a) provides that closed circuit television proceedings may be used only if the trial court has adopted rules setting out the types of proceedings that may be so conducted. Courts are cautioned to adopt rules as required by the statute, but no plain error occurred where the failure to adopt formal rules did not deprive defendant of any substantial rights.

People v. Stroud, 208 Ill.2d 398, 804 N.E.2d 510 (2004) A guilty plea proceeding may be conducted by closed circuit television only if defendant specifically consents to the procedure after admonishment of the right to be physically present. See also, **People v. Guttendorf**, 309 Ill.App.3d 1044, 723 N.E.2d 838 (3d Dist. 2000).

People v. Williams, 312 Ill.App.3d 232, 726 N.E.2d 641 (1st Dist. 2000) An unfit defendant is entitled to attend a discharge hearing to determine whether the evidence is sufficient to prove him guilty beyond a reasonable doubt.

People v. Etheridge, 35 Ill.App.3d 981, 343 N.E.2d 55 (3d Dist. 1976) A defendant has the right to be personally present at every stage of the trial, from arraignment to final sentence.

People v. O'Quinn, 339 Ill.App.3d 347, 791 N.E.2d 1066 (5th Dist. 2003) Both the Federal and State Constitutions afford defendant the right to attend the trial and all critical stages of the proceedings. The due process right to be present is violated only where defendant's absence results in denial of a fair trial. The relevant question is not whether defendant would have avoided conviction had he been present, but whether his presence would have contributed to his opportunity to defend himself against the charges. The trial court's holding concerning the constitutional right to attend a proceeding is reviewed de novo.

Defendant was not denied a fair trial where he was removed from the courtroom after he spit water at several jurors as they were returning to the courtroom for closing arguments. Defendant was present during the voir dire and at all times during the presentation of evidence, and was removed only for closing arguments.

People v. Escalante, 256 Ill.App.3d 239, 627 N.E.2d 1222 (2d Dist. 1994) As a matter of plain error, a defendant who does not speak English is not "present" for purposes of the Sixth Amendment unless he is assisted by an interpreter.

People v. Smith, 76 Ill.App.3d 191, 392 N.E.2d 682 (2d Dist. 1979) A hearing on whether to grant a jury's request to review transcripts of testimony is not a proceeding that involves defendant's "substantial rights." Thus, it may be held outside defendant's presence. See also, **People v. Saltz**, 75 Ill.App.3d 477, 393 N.E.2d 1292 (2d Dist. 1979) (motion for mistrial and examination of jurors concerning publicity).

People v. McLaurin, 382 Ill.App.3d 644, 894 N.E.2d 138 (1st Dist. 2008), leave to appeal allowed, 229 Ill.2d 626, 897 N.E.2d 260 (9/24/08) A criminal defendant has a constitutional right to appear and be present during each critical stage of his trial. Jury deliberations are a critical stage. Thus, defendant has the right to be personally present when communications from the jury are considered.

As a matter of plain error, the trial court erred by excluding defendant from conferences at which the trial court and the attorneys considered notes received from the jury during deliberations.

People v. McDonald, 322 Ill.App.3d 244, 749 N.E.2d 1066 (3d Dist. 2001) Defendant has the right to appear at a "material witness bond hearing" (725 ILCS 5/109-3(d)) if his substantial rights or the fundamental fairness of the hearing would be affected. The State erred by failing to give notice to defendant or his attorney that the State was seeking material witness bonds, but defendant was not prejudiced under the facts of this case.

People v. Collins, 184 Ill.App.3d 321, 539 N.E.2d 736 (1st Dist. 1989) During the hearing on a motion to suppress, defendant Ellis and his codefendants were excused from the courtroom at the suggestion of the trial judge. The judge stated "this is only dealing with legal arguments" and did not inform defendant that any further testimony would be heard. However, after Ellis left, his counsel cross-examined a police officer who had both helped locate Ellis after the crime and obtained an admission concerning the offense. Thus, Ellis was absent from a portion of the hearing that involved his substantial rights. Ellis did not waive his right to be present where he was told that only legal arguments would be heard in his absence. The error was not cured by the presence of defense counsel, because an attorney cannot waive defendant's right to be present.

People v. Bennett, 282 Ill.App.3d 975, 669 N.E.2d 717 (3d Dist. 1996) Defendant's federal and State rights to an impartial jury and to be present were violated where 16 of the 29 veniremembers were questioned outside defendant's presence. Defendant could have helped counsel decide whether peremptory challenges should be exercised against any of five members of the petit jury who were questioned in defendant's absence. The trial court's asserted reason for excluding defendant (that there was a security risk) was not sustained by the record.

People v. Stokes, 293 Ill.App.3d 643, 689 N.E.2d 625 (1st Dist. 1997) The trial judge erred by starting voir dire while defendant was absent. Although the right to be present is waived where defendant is wilfully absent from trial, the State failed to present any evidence that defendant's absence was wilful.

Cumulative Digest Case Summaries **§52-2(a)**

Presley v. Georgia, ___ U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010)

1. The federal constitutional right to a public trial rests on two provisions – the Sixth Amendment (which protects the defendant's right to a "speedy and public trial"), and the First Amendment. The court concluded that jury selection is a stage of the trial at which there are clearly both First and Sixth Amendment rights to a public proceeding. Thus, jury selection can be closed only if there is an overriding State interest that is likely to be prejudiced by an open proceeding, the trial court considers reasonable alternatives to closing the proceeding, and the court makes adequate findings to support the closure.

2. The court rejected the Georgia Supreme Court's holding that the trial judge need not consider alternatives to closure when it decides *sua sponte* to close *voir dire* to the public. "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."

3. The court also noted that the trial court failed to identify any overriding interest that was likely to be prejudiced unless the public was excluded from *voir dire*. The trial court mentioned only its fear that a veniremember might overhear conversations by members of the public, a "generic risk" that is "inherent whenever members of the public are present during the selection of jurors." The court added, "If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course."

The court acknowledged that there might be circumstances in which the trial judge could legitimately conclude that threats of improper communication with jurors or safety concerns warrant closing *voir dire*. In such cases, the particular interest at stake and the threat to that interest must be articulated by the judge, along with sufficiently specific findings that a reviewing court can review the propriety of the closure order.

People v. Eppinger, 2013 IL 114121 (No. 114121, 2/22/13)

1. 725 ILCS 5/115-4.1(a) provides that where the defendant fails to appear for trial after an initial court appearance and the State affirmatively proves through substantial evidence that the defendant is wilfully avoiding trial, the trial may be held *in absentia*. However, the absent defendant must be represented by retained or appointed counsel.

The court concluded that §115-4.1(a) was not intended to apply where a defendant who was in custody and who had elected to waive counsel and represent himself was absent from trial because he refused to leave his cell. The intent behind §115-4.1(a) was to prevent bail jumping and avoid problems of disappearing witnesses and stale evidence. The court concluded that the legislature did not intend to apply §115-4.1(a) to a witness who is in custody but "essentially boycotts his or her own trial."

Because §115-4.1(a) is inapplicable, the trial court did not err by holding a trial in defendant's absence without first appointing the public defender.

2. The court rejected the argument that the only statutory authority for trials *in absentia* is §115-4.1, and that in view of the court's holding that §115-4.1 did not apply in this situation, the trial court lacked authority to try defendant after he refused to leave his cell. The fact that §115-4.1 regulates trials *in absentia* in some cases does not mean that trials *in absentia* are prohibited in all other cases. Express statutory authority to proceed *in absentia* is not required so long as the trial complies with the federal and state constitutions.

Furthermore, although a criminal defendant has the right to be present in all stages of his trial, he may choose to waive that right.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

People v. Johnson, 238 Ill.2d 478, 939 N.E.2d 475 (2010)

1. Ordinarily, appellate review is waived unless the defendant both objected to an error at trial and raised the issue in the post-trial motion. The plain error rule allows a reviewing court to consider a forfeited claim when the evidence was so closely balanced that the error threatened to tip the scales of justice against the defendant, or where the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

2. The second prong of the plain error rule was not satisfied where defendant failed to object when the trial court responded to a jury question without notifying the parties. In the course of its opinion, the court noted that although criminal defendants have a general right to be present at every stage of the trial, the right to be present is not itself a substantial right under the Illinois or federal constitutions. Instead, it is a lesser right intended to secure substantial rights such as the right to confrontation, the right to present a defense, or the right to an impartial jury. Because the defendant failed to show that any of these underlying substantive rights had been violated, responding to the note in the absence of defendant or his counsel was not such a serious error as to affect the fairness of the trial or the integrity of the judicial process.

The court acknowledged that historically, it granted a new trial whenever *ex parte* communication occurred between the trial judge and the jury. In recent years, however, it has moved away from that rule and requires a new trial only if the defendant suffered prejudice. Because the court's response to continue deliberations was well within the court's discretion and was not coercive, no prejudice occurred.

Defendant's conviction for criminal sexual abuse was affirmed.

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

People v. McLaurin, 235 Ill.2d 478, ___ N.E.2d ___ (2009) (No. 106736, 12/17/09)

Plain error did not occur where the trial court responded to communications from the jury in defendant's absence but in the presence of counsel, or when the judge sent a bailiff to deliver a message to the jury. (See **JURY**, §§32-6(a), (c)).

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Oliver, 2012 IL App (1st) 102531 (No. 1-10-2531, 5/9/12)

The broad right to be present at trial is not itself a substantial right, but is a means to securing the substantial rights of the defendant. Thus a defendant is not denied a constitutional right whenever he is not present at trial, but only when his absence results in unfair proceedings that deny him his substantial rights. A defendant's absence from jury selection results in a constitutional violation only where it has an effect on the impartiality of the jury selected.

Because defendant's absence did not have the slightest effect on the impartiality of his jury, his exclusion was not error.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

Top

§52-2(b)
Trial Where Defendant Absents Himself

Taylor v. U.S., 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973) It was proper to proceed with trial in defendant's absence where he failed to return after the lunch recess. The right to be present was effectively waived by defendant's voluntary absence.

Degen v. U.S., 517 U.S. 820, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996) Fact that defendant refused to return to jurisdiction to answer criminal charges did not justify trial court's refusal to consider his answer in a related civil forfeiture proceeding.

People v. Ramirez, 214 Ill.2d 176, 824 N.E.2d 232 (2005) 725 ILCS 5/ 115-4.1(a) authorizes a trial in absentia where: (1) defendant who has made an initial court appearance for a non-capital felony fails to appear for trial, (2) the State affirmatively proves that defendant is willfully avoiding trial, and (3) defendant was either present in open court when the trial date was set or has been sent, by certified mail, a notice of the trial date.

Under existing precedent, the State affirmatively proves that a defendant is wilfully avoiding trial by establishing a prima facie case that defendant: (1) was informed of the trial dates; (2) was advised that failure to appear could result in trial in absentia; and (3) failed to appear for trial when the case was called. Strict compliance with the certified mail requirement is necessary to show that defendant was informed of the trial date.

People v. Smith, 188 Ill.2d 335, 721 N.E.2d 553 (1999) The validity of a ruling to proceed in absentia "must be viewed from the perspective of the court at the time the ruling is made." Where the trial court could not have known that defendant would appear after only a short absence, the fact that defendant appeared a few minutes after trial began was irrelevant to whether the trial court abused its discretion. Where defendant has been admonished of the possibility of a trial in absentia and thereafter fails to appear, a "very strong inference" arises that defendant deliberately elected not to appear.

People v. Flores, 104 Ill.2d 40, 470 N.E.2d 307 (1984) Ch. 38, ¶115-4.1, which provides that in "any criminal trial, where a defendant after his trial commences willfully absents himself from court for a period of 2 successive court days, the court shall proceed with trial," is permissive rather than mandatory.

People v. Partee, 125 Ill.2d 24, 530 N.E.2d 460 (1988) An *in absentia* conviction and sentence is a final and appealable judgment. A motion for a willfulness hearing under ¶115-4.1(e) (to determine if defendant's absence was willful) is not required before an appeal can be taken.

The admonishments to a defendant under ¶113-4(e) (regarding the possibility of trial *in absentia*) are mandatory. Where the report of proceedings did not show that defendant received the required admonishments, but the common law record noted that he was admonished and the trial judge stated at the post-trial hearing that defendant had been advised of the possibility of trial in absentia, the cause was remanded to determine whether proper admonishments were in fact given.

People v. Garner, 147 Ill.2d 467, 590 N.E.2d 470 (1992) Defendant's in absentia convictions were reversed, because he was not admonished that trial could be held in his absence if he escaped or failed to appear. There is no exception to the admonishment requirement for "experienced criminals" such as defendant.

Defendant did not waive his right to be admonished by voluntarily absenting himself following the arraignment. Where a defendant is present at the arraignment, the trial court's decision "not to admonish him [at that time] . . . is not a failing which should result in a penalty to the defendant."

People v. Polk, 55 Ill.2d 327, 303 N.E.2d 137 (1973) Trial judge did not abuse discretion by declaring mistrial rather than trying defendant in absentia.

People v. Martinez, 361 Ill.App.3d 424, 857 N.E.2d 479 (2d Dist. 2005) Despite the unavailability of transcripts of relevant hearings, it could be presumed that the trial court announced the trial date in open court and in defendant's presence.

People v. Gargani, 371 Ill.App.3d 729, 863 N.E.2d 762 (2d Dist. 2007) Trial in absentia was erroneous where defendant was not represented by counsel. 725 ILCS 5/115-4.1(a) provides that an absent defendant "must be represented by retained or appointed counsel."

People v. McCombs, 372 Ill.App.3d 967, 866 N.E.2d 1200 (3d Dist. 2007) Statute which requires that a defendant tried in absentia be represented by retained or appointed counsel, applies even where defendant waived counsel before he absconded. The statute contains no exception to the counsel requirement where there was a previous waiver, although it does specifically authorize a bench trial in absentia if defendant previously waived a jury.

Where a defendant absconds after waiving counsel, the trial court may conduct a trial *in absentia* only after appointing counsel and providing reasonable time for counsel to prepare.

People v. Hill, 208 Ill.App.3d 887, 567 N.E.2d 626 (2d Dist. 1991) By voluntarily absenting himself after being admonished that the trial could proceed without him, defendant waived his right to be present. The trial judge had discretion to proceed to trial when defendant failed to appear. However, absent a knowing

and intelligent waiver, a defendant may not be imprisoned for any offense unless he was represented by counsel at trial.

People v. Rife, 18 Ill.App.3d 602, 310 N.E.2d 179 (4th Dist. 1974) Defendant waived right to be present at sentencing by voluntarily escaping from jail.

People v. Phillips, 371 Ill.App.3d 948, 864 N.E.2d 823 (1st Dist. 2007) The trial judge erred by sentencing defendant *in absentia* where it failed to give the admonishment required by 725 ILCS 5/113-4(e), which mandates that a defendant be informed of the possibility of trial and sentencing **in absentia**.

People v. Manikowski, 288 Ill.App.3d 157, 679 N.E.2d 840 (5th Dist 1997) Seven years after he was convicted, defendant filed a post-conviction petition alleging that his constitutional rights had been violated when he was tried in absentia. Defendant's petition asserted that he boarded a plane in California two days before his trial was scheduled to begin, but the flight was delayed in Arizona due to weather conditions. Defendant called his lawyer, advised her of his travel difficulties, and asked her to obtain a continuance until he could get to Illinois.

Defendant eventually arrived in St. Louis and took a bus to Paducah, which was ten miles from the courthouse where the trial was held. Defendant again called his lawyer, but was told that she was in court. He called again a few hours later, and engaged in a discussion with his lawyer which left him "uneasy." He called his codefendant's lawyer, who informed him that the trial had started two days earlier, that none of defendant's witnesses had been heard, and that deliberations were to begin that afternoon. "[F]earing the outcome of such a trial," defendant fled.

Defendant's refusal to appear for the final stages of trial did not necessarily constitute a wilful absence from trial. Although defendant's decision to flee was "indefensible," the failure to appear once he learned that the trial was nearly over had no bearing on the reasonableness of the trial court's initial decision to hold the trial in absentia. Even had defendant appeared during the final stages of the trial, his earlier absence would not have been cured – "the trial was beyond repair."

Because defendant's failure to appear at the latter stages of trial did not constitute a wilful absence from earlier stages, the trial court erred by dismissing the post-conviction petition. See also, **People v. Johnson**, 293 Ill.App.3d 915, 689 N.E.2d 179 (1st Dist. 1997) (trial court erred by conducting hearing on probation revocation petition where defendant was in hospital cardiac unit; there was no indiction that the hospitalization was due to defendant's voluntary failure to appear); **People v. Stokes**, 293 Ill.App.3d 643, 689 N.E.2d 625 (1st Dist. 1997) (conducting voir dire before defendant arrived).

Cumulative Digest Case Summaries **§52-2(b)**

People v. Eppinger, 2013 IL 114121 (No. 114121, 2/22/13)

1. 725 ILCS 5/115-4.1(a) provides that where the defendant fails to appear for trial after an initial court appearance and the State affirmatively proves through substantial evidence that the defendant is wilfully avoiding trial, the trial may be held *in absentia*. However, the absent defendant must be represented by retained or appointed counsel.

The court concluded that §115-4.1(a) was not intended to apply where a defendant who was in custody and who had elected to waive counsel and represent himself was absent from trial because he refused to leave his cell. The intent behind §115-4.1(a) was to prevent bail jumping and avoid problems of disappearing witnesses and stale evidence. The court concluded that the legislature did not intend to apply §115-4.1(a) to a witness who is in custody but "essentially boycotts his or her own trial."

Because §115-4.1(a) is inapplicable, the trial court did not err by holding a trial in defendant's absence without first appointing the public defender.

2. The court rejected the argument that the only statutory authority for trials *in absentia* is §115-4.1, and that in view of the court's holding that §115-4.1 did not apply in this situation, the trial court lacked authority to try defendant after he refused to leave his cell. The fact that §115-4.1 regulates trials *in absentia* in some cases does not mean that trials *in absentia* are prohibited in all other cases. Express statutory authority to proceed *in absentia* is not required so long as the trial complies with the federal and state constitutions.

Furthermore, although a criminal defendant has the right to be present in all stages of his trial, he may choose to waive that right.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

People v. Phillips, 242 Ill.2d 189, 950 N.E.2d 1126 (2011)

A defendant has the constitutional right to be present at all stages of his trial, including sentencing. A defendant's voluntary absence from trial may be an effective waiver of this right, and he may be tried and sentenced *in absentia* even if he is not warned that this is a possible consequence of his absence.

In Illinois, a defendant has a statutory right to be admonished as to the possible consequences of his failure to appear. When a defendant appears in court at the time of his arraignment, or is present in court at any time after his arraignment, the court "shall advise him . . . that if he . . . is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence." 725 ILCS 5/113-4(e). This admonition serves as the procedural mechanism to effect a formal waiver of a defendant's right to be present.

Defendant was sentenced *in absentia*, and was never admonished in accordance with §113-4(a). However, he signed a bail bond slip containing the §113-4(e) admonitions, as well as a statement that he accepted these terms and conditions and certified that he understood the consequences of failing to appear for trial as required. Reaching a question that it left open in **People v. Garner**, 147 Ill. 2d 467, 590 N.E.2d 470 (1992), the Illinois Supreme Court found the bond slip insufficient to establish a waiver of defendant's right to be present.

Section 113-4(e) unambiguously requires that the trial court admonish the defendant in open court. An oral admonition is most effective to meet the legislative purpose of §113-4(e) by providing the trial judge with the opportunity to both notify the defendant of his right and obligation to be present at trial, and to verify that he understands this important right and duty. Defendant was required to sign the bond slip as a condition of his release from jail, a far different circumstance than his voluntary relinquishment of a known statutory right in court. There can be no substantial compliance with §113-4(e) when a judge never admonishes a defendant in any way under §113-4(e).

The court was not persuaded to find a waiver due to the presence of the signature of the deputy clerk of the court on the bond slip under the representation that "[t]he above conditions and certification of defendant have been taken, entered into and acknowledged before me." The trial court's duty to advise the defendant regarding trial *in absentia* could not be delegated to the clerk as clerks cannot perform functions reserved for trial judges.

Because defendant was sentenced *in absentia* without compliance with §113-4(e), the court vacated defendant's sentence and remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Stephen Gentry, Chicago.)

People v. Cobian, 2012 IL App (1st) 980535 (No. 1-98-0535, 8/27/12)

1. A criminal defendant has a constitutional right to be present at all stages of trial, and to confront the witnesses against him. The defendant's voluntary absence from trial may be construed as a waiver of those rights. However, 725 ILCS 5/113-4(e) provides that a defendant who pleads not guilty must be advised that if he escapes from custody or is released on bond and fails to appear when required, the failure to appear will constitute a waiver of the right to confront witnesses and will allow the trial to proceed in his absence.

Substantial compliance with the admonition requirement of §113-4(e) is sufficient to allow the trial to proceed *in absentia*.

The court rejected the argument that defendant's admonishments were insufficient because they took place at his arraignment on a previous indictment, which was superceded by an indictment charging the same crime but adding an additional co-defendant. "Regardless of whether the defendant received a warning specifically tied to the indictment that underlay his conviction, he did receive a warning that he could be tried *in absentia* for exactly the same conduct. That is all that is required to meet the purpose of the admonishment statute."

2. 725 ILCS 5/115-4.1(e) authorizes a defendant who was tried *in absentia* to obtain a new trial or sentencing hearing if he can establish that the failure to appear was both not his fault and due to circumstances beyond his control. Illinois case law requires that an evidentiary hearing must be held on a §115-4.1(e) request for a new trial. (See **People v. Brown**, 121 Ill. App. 3d 776, 459 N.E.2d 1175 (2nd Dist. 1984)). Thus, the trial court erred by denying defendant's §115-4.1(e) motion for a new trial without holding an evidentiary hearing. The trial court's ruling was vacated and the cause remanded with instructions to hold an evidentiary hearing on the motion.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Henry, 2016 IL App (1st) 150640 (No. 1-15-0640, 6/30/16)

At his trial for first-degree murder, aggravated battery with a firearm, and unlawful use of a weapon, defendant failed to return to court when the proceedings ended on the first day. Bond was revoked and a warrant was issued for defendant's arrest. The trial continued, and defendant was convicted and sentenced *in absentia*.

Defendant was arrested some three years later, and began to serve the sentence that had been imposed *in absentia*. He then filed a post-conviction petition arguing that trial counsel had been ineffective for failing to investigate and call alibi witnesses at trial.

The State argued that by absenting himself from trial, defendant "chose to forego" his alibi defense. The court rejected this argument, noting that defendant's voluntary absence from trial may waive the rights to be present and confront witnesses but does not waive the right to the effective assistance of counsel. The court noted that under Supreme Court Rule 401, a defendant charged with an offense punishable by imprisonment may waive counsel only in open court and only after being properly admonished by the trial court of the consequences of a waiver. Because there was no such waiver in the record, defendant's flight did not waive his right to the effective assistance of counsel.

However, the court went on to find that defense counsel was not ineffective.

(Defendant was represented by Assistant Defender Roxanna Mason, Chicago.)

People v. Lane, 2011 IL App (3d) 080858 (No. 3-08-0858, mod. op. 7/18/11)

Defendant has a constitutional right to be present at trial, and a statutory right to be admonished of the consequences of his failure to appear at trial. 725 ILCS 5/113-4(e) provides that "[i]f a defendant pleads not guilty, the court shall advise him at that time or at any later court date on which he is present that if he . . . is released on bond and fails to appear when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence." Thus, the statutory admonishments are valid only if they are given when defendant pleads guilty or at a subsequent hearing when defendant is present.

Even if defendant is notified of the trial date and voluntarily fails to appear, he cannot be tried *in absentia* unless he was admonished in accordance with the statute.

Defendant was tried *in absentia*. There were two notations in the common law record that the court gave 113-4(e) admonitions. The first occurred at defendant's first appearance on the date of his arrest. There was no transcript of these proceedings. Because these admonitions were given before defendant entered a not guilty plea, they did not conform to the plain language of the statute.

The second indication in the common law record indicated that 113-4(e) admonitions were given on the date of arraignment. While the common law record is ordinarily presumed to be correct, if the report of proceedings conflicts with the common law record, the report of proceedings controls. Because no 113-4(e) admonitions appeared in the transcript of the arraignment, the court concluded that the record did not show compliance with 113-4(e).

The Appellate Court reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Lane, 404 Ill.App.3d 254, 935 N.E.2d 578 (3d Dist. 2010)

Defendant has a constitutional right to be present at trial. He also has a statutory right to be admonished of the consequences of his failure to appear at trial. 725 ILCS 5/113-4(e) provides that "[i]f a defendant pleads not guilty, the court shall advise him at that time or at any later court date on which he is present that if he . . . is released on bond and fails to appear when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence." Even if defendant is notified of the trial date and voluntarily fails to appear, he cannot be tried *in absentia* if he is not admonished in accordance with the statute.

Defendant was tried *in absentia*. There were two notations in the common law record that the court gave 113-4(e) admonitions. The first occurred at defendant's appearance in court on the date of his arrest. There was no transcript of these proceedings. Because the plain language of the statute required that defendant be admonished when he entered his not guilty plea, or at a later date, any admonitions given on this first court date were ineffective because no plea was entered on that date. The second indication of 113-4(e) admonitions was on the date of arraignment. While the common law record is ordinarily presumed to be correct, if the report of proceedings conflicts with the common law record, the report of proceedings controls. No 113-4(e) admonitions appeared in the transcript of the arraignment. Therefore, the record did not show 113-4(e) compliance.

The Appellate Court reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Montes, 2013 IL App (2d) 111132 (No. 2-11-1132, 6/28/13)

In Illinois, a trial *in absentia* can be conducted only if the defendant was orally admonished regarding the possible consequences of failing to appear in court when required. When a defendant pleads not guilty, the court "shall advise him at that time or at any later date on which he is present that if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence." 725 ILCS 5/113-4(e). Only substantial compliance with §113-4(e) is necessary to permit trial of an absent defendant.

The court admonished defendant that if he failed to appear at "any scheduled court hearing that would be considered a waiver of [his] right to confront the witnesses against [him] and that hearing could proceed in his absence." While this admonition was not perfect in that the court used the word "hearing" rather than "trial," it substantially complied with the requirements of §113-4(e) and sufficiently informed defendant that if he failed to appear, trial could proceed in his absence.

In addition to the oral admonition, defendant signed a bond form that stated that he must appear at all scheduled court hearings, and that if he failed to do so, trial could proceed in his absence. Written admonitions alone do not satisfy §113-4(e), but the written admonition together with the oral admonition sufficiently informed defendant that trial could proceed in his absence.

People v. Phillips, 394 Ill.App.3d 808, 917 N.E.2d 110 (1st Dist. 2009)

725 ILCS 5/113-4(e) provides that a defendant who pleads not guilty shall be advised "at that time or at any later court date on which he is present" that if he fails to appear in court while on bond, the failure

to appear: (1) constitutes a waiver of the right to confrontation, and (2) allows the trial to proceed in his absence. Section 113-4(e) was not satisfied by a bond slip which had been signed by the defendant and which stated that the failure to appear when required would waive the right to confrontation and allow the trial or sentencing to proceed in defendant's absence. The court stressed that §113-4(e) "unambiguously" requires the trial court to admonish the defendant concerning the consequences of failing to appear in court – a printed notice on a bond sheet is not a sufficient substitute for a warning by the trial judge.

The sentence imposed *in absentia* was vacated and the cause remanded for a new sentencing hearing. (Defendant was represented by Assistant Defender Stephen Gentry, Chicago.)

Top

§52-3
Physical Restraints – Jail Clothing

Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) Although an obstreperous defendant may be bound and gagged, the sight of shackles and gags might have a significant effect on the jury's feelings about defendant. In addition, such action is an affront to the dignity and decorum of judicial proceedings and reduces defendant's ability to communicate with his counsel.

Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) The State cannot, consistent with the Fourteenth Amendment, compel an accused to appear before the jury while dressed in identifiable prison clothes. However, no constitutional violation occurred here, where there was no showing that defendant was compelled to stand trial in jail garb and he failed to object in the trial court.

Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) Presence of four armed and uniformed state troopers in the courtroom, to supplement the court security force, was not so inherently prejudicial that defendant was denied a fair trial.

Deck v. Missouri, 540 U.S. 1006, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) Due process prohibits the use of physical restraints that are visible to the jury during trial, unless the trial court determines that the restraints are justified by a State interest that is specific to the particular trial. Among the factors which may be considered in determining whether restraints are justified are potential security problems and the risk that defendant might attempt to escape. The same restrictions apply to a death penalty hearing.

Here, due process was violated by the use of leg irons, handcuffs and a belly chain upon remand for a new death hearing. First, the record established that the jury saw the restraints worn by defendant. Second, the trial court failed to recognize that it was required to exercise its discretion in determining whether the restraints should be allowed.

Visible shackling is inherently prejudicial. A sentence imposed at a hearing at which there was unjustified restraint can be affirmed only if the State proves beyond a reasonable doubt that the shackling did not contribute to the verdict.

People v. Boose, 66 Ill.2d 261, 362 N.E.2d 303 (1977) The Supreme Court discussed the reasons why shackling should be avoided, what may justify shackling, and the factors to be considered. The determination is left to the discretion of the trial judge, who should state for the record the reasons for shackling and allow defense counsel an opportunity to respond.

Here, the trial judge abused his discretion by ordering defendant shackled at a competency hearing conducted before a jury. The only reason the judge gave for shackling was the nature of the crime, which

is only one factor to be considered and not in itself sufficient justification. See also, **People v. Bennett**, 281 Ill.App.3d 814, 666 N.E.2d 899 (1st Dist. 1996) ("poor security" was not adequate basis for shackling where restraints could have been removed once defendant was in courtroom; defendant did not waive issue where he asked to have shackles removed but raised no other objection; improper shackling is not harmless merely because jury did not see restraints, because defendant's ability to cooperate with counsel and assist in defense was compromised).

People v. Buss, 187 Ill.2d 144, 718 N.E.2d 1 (1999) Under **People v. Boose**, 66 Ill.2d 261, 362 N.E.2d 303 (1977), shackling is generally disfavored because it prejudices the jury against the accused, restricts defendant's ability to assist his counsel during trial, and offends the dignity of the judicial process. However, shackling is permitted where defendant may try to escape or disrupt the proceedings or poses a threat to the safety of the occupants of the courtroom.

Several factors are to be considered in determining whether a defendant may be shackled, including: (1) the seriousness of the charge; (2) defendant's temperament and character; (3) defendant's age, physical attributes, and past record; (4) past escapes or attempted escapes; (5) any evidence of a present plan to escape; (6) any threats to harm others or cause a disturbance; (7) any self-destructive tendencies; (8) any risk of mob violence or attempted revenge by others, (9) the possibility of rescue by offenders still at large; (10) the size and mood of the audience; (11) the nature and physical security of the courtroom; and (12) the adequacy and availability of alternative remedies.

The trial court did not abuse its discretion by requiring defendant to be shackled. The court stressed the need for courtroom security, the extremely serious nature of the charge, and the large audience in the courtroom. In addition, the tables were arranged so the shackling was "never obvious to the jurors," and the jury was removed during conferences so defendant could hear conversations between the judge and the attorneys.

In re Staley, 67 Ill.2d 33, 364 N.E.2d 72 (1977) Handcuffing of minor at a juvenile proceeding was improper; there was no reason to believe minor might try to escape or posed a threat to the safety of people in the courtroom. In addition, there was no basis to conclude that handcuffing was necessary to maintain order. Without such a showing, an accused cannot be tried in shackles in either a bench or jury trial.

People v. Hyche, 77 Ill.2d 229, 396 N.E.2d 6 (1979) By failing to object in the trial court, defendant waived any claim of error that on the first day of jury selection he appeared in handcuffs.

People v. Urdiales, 225 Ill.2d 354, 871 N.E.2d 669 (2007) The trial court did not abuse its discretion by ordering that defendant's legs and left arm be shackled. The leg shackles were not visible to the jury, and defendant's left hand was shackled only after an outburst which occurred during a recess.

People v. Allen, 222 Ill.2d 340, 856 N.E.2d 349 (2006) Due process prohibits requiring a criminal defendant to wear an electronic stun belt, without the trial court first determining that use of the belt is appropriate under the circumstances. However, because defendant had not shown that use of the belt denied him a fair trial, the plain error rule did not apply.

People v. Johnson, 387 Ill.App.3d 768, 902 N.E.2d 126 (3d Dist. 2009) Restraining defendant during trial is to be avoided, if possible, because of the potential prejudice to the jury, the restriction on defendant's ability to assist his counsel during trial, and the need to afford to defendant the dignity of the judicial process. To justify restraining defendant in the jury's presence, there must be a showing of a "manifest need." Examples of a "manifest need" are evidence that defendant may try to escape or poses a threat to the safety of the people in the courtroom, or that restraint is necessary to maintain order during trial. The "manifest need" standard is intended to permit restraint only in exceptional cases.

The decision to restrain is left to the discretion of the trial court, which may select the physical restraint most suitable in light of all the circumstances. An electronic safety belt is a "restraint" similar to shackles and handcuffs.

The trial court abused its discretion by ordering defendant to be restrained. Defendant was charged with aggravated battery and armed robbery, but there was nothing about the charges which indicated that he was likely to disrupt the proceedings or attempt to escape. Defendant's criminal history showed no greater escape risk than any other felony defendant, and defendant was of slight stature. There was no evidence that defendant planned to be disruptive or attempt to escape, and there were no codefendants at large.

In addition, there was no evidence of any self-destructive or violent tendencies on the part of defendant, there were no spectators in the gallery, and viable alternatives were available because deputies could have been used to secure the courtroom.

Defendant's convictions were reversed and the cause remanded for a new trial.

People v. Harris, 388 Ill.App.3d 1007, 904 N.E.2d 1200 (3d Dist. 2009) Plain error occurred where, without the knowledge of defense counsel or the trial judge, the sheriff required defendant to wear an electronic stun belt at trial. Under Illinois law, the trial court must conduct a hearing before a defendant can be required to wear a restraint during trial.

Defendant was denied a substantial right and a fair trial where his fear that the stun belt might go off "accidentally" caused him to decline to testify, although the trial court had granted a motion in limine to preclude the use of prior convictions as impeachment. The court noted that the State did not rebut defendant's testimony that he was told by a deputy that he could not have a trial unless he signed a consent to wear the stun belt; "[c]onditioning a jury trial upon defendant's written consent to wear a concealed electronic stun belt, without the court's or counsel's knowledge, challenges the integrity of the judicial process."

People v. Barney, 363 Ill.App.3d 590, 844 N.E.2d 80 (4th Dist. 2006) Plain error does not necessarily occur where a criminal defendant is shackled during a jury trial without the trial court first holding a hearing under **People v. Boose**, 66 Ill.2d 261, 362 N.E.2d 203 (1977).

People v. Doss, 347 Ill.App.3d 418, 807 N.E.2d 697 (3d Dist. 2004) The trial court committed plain error by requiring defendant to wear shackles at his jury trial for armed robbery. Where the defense theory of the case was one of mistaken identity, the trial court erred by allowing shackling solely because it believed that the jurors could not see the shackles. The trial court abused its discretion by ordering shackling without finding that there were compelling reasons to do so.

People v. McCue, 175 Ill.App.3d 762, 530 N.E.2d 271 (3d Dist. 1988) Handcuffing of defendants at a jury trial for escape was proper. Shackling was appropriate because defendants were charged with serious felonies, were aware of courtroom procedures, were physically capable of escaping, had histories of attempting to escape from custody, and had previously acted in concert while attempting to escape.

People v. Minish, 19 Ill.App.3d 603, 312 N.E.2d 49 (3d Dist. 1974) Defendant was not prejudiced by being attired in jail clothes; defendant did not object, but attempted to utilize his attire to elicit sympathy from the jury.

People v. Johnson, 54 Ill.App.3d 970, 370 N.E.2d 611 (3d Dist. 1977) Defendant, who was in the custody of the Department of Corrections, was not prejudiced because two uniformed correctional officials were allowed to sit behind him during trial. However, the "better practice" would be to require such guards to wear civilian clothing.

People v. Fields, 322 Ill.App.3d 1029, 751 N.E.2d 97 (5th Dist. 2001) The trial judge did not abuse his discretion by ordering that defendant wear shackles. Although shackling is not justified merely because

defendant is accused of a violent act, defendant was charged with aggravated battery against correctional officers at Tamms Correctional Center and had demonstrated violent tendencies throughout his time in DOC. In addition, the trial court modified its original order and removed the shackles from defendant's hands, thereby reducing the possibility that the jury would be prejudiced.

Similarly, the trial court did not abuse its discretion by ordering that several uniformed guards attend the trial. The trial judge discussed the number of guards with both parties, and attempted to balance defendant's right to a fair trial with the level of protection necessary for security purposes. In addition, there is no absolute limit on the number of uniformed guards in the courtroom during trial.

People v. Love, 327 Ill.App.3d 313, 763 N.E.2d 829 (4th Dist. 2002) Trial judge did not abuse his discretion by requiring defendant to wear a mask during his trial. Defendant was charged with aggravated battery for spitting on a correctional officer, had a history of spitting and biting, and had threatened to spit on court and correctional personnel.

Cumulative Digest Case Summaries **§52-3**

In re Jonathan C.B., ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 107750, 6/30/11)

Under **People v. Boose**, 66 Ill.2d 261, 362 N.E.2d 303 (1977), shackling of a defendant during trial tends to prejudice the jury against the accused, restrict the ability to assist counsel during trial, and offend the dignity of the judicial process. Therefore, a defendant may be shackled during court proceedings only if there is a manifest need for restraint. **Boose** specified several factors to be considered by the trial court in determining whether shackling is manifestly necessary.

Under **In re Stanley**, 67 Ill.2d 33, 364 N.E.2d 72 (1977), the **Boose** rule was extended to juvenile delinquency proceedings although such proceedings do not occur before a jury. Here, the minor argued that the trial judge has a *sua sponte* duty to inquire whenever a child appears in court in shackles, or in the alternative that plain error occurs where a juvenile is shackled for trial without the benefit of a **Boose** hearing.

The Supreme Court concluded that where the only reference in the record to shackling occurred when the minor was called to testify, at which point the trial court stated "[y]ou may take off the shackles," the record did not support the conclusions that the judge was aware that the minor had been shackled throughout the trial or that the shackles were put back on after the minor testified. Because the alleged error was allowing the minor to remain shackled without a **Boose** hearing, there was no indication that the judge knew the minor was shackled before he was called to testify, and the trial judge is presumed to know and follow the law unless the record affirmatively indicates otherwise, "we presume that the trial court acted properly and did not commit error with regard to [the minor's] shackling."

The court reiterated, however, that "if a trial court *is aware or becomes aware* that a defendant, whether adult or juvenile, is shackled, the trial court must conduct a **Boose** hearing to determine whether there is a manifest need for the restraint."

In dissenting opinions, Justices Kilbride, Freeman and Burke found that it "strains credulity" (J. Freeman) to believe that the trial judge learned that the minor was shackled only when the minor testified on the third day of trial. Justice Burke also criticized the majority for ignoring the State's concession that **Boose** error occurred and presuming instead that no error occurred.

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Harding, 2012 IL App (2d) 101011 (No. 2-10-1011, 2/21/12)

1. Shackling the defendant during trial tends to prejudice the jury against the accused, restrict the defendant's ability to assist counsel, and offend the dignity of the judicial process. Thus, shackling is to be avoided unless there is a manifest need for restraint. Among the factors to be considered in determining

whether there is such a manifest need are: (1) the seriousness of the offense; (2) the defendant's temperament and character; (3) the defendant's age and physical characteristics; (4) the defendant's past record; (5) any prior escapes or attempted escapes; (6) any evidence of a present plan to escape; (7) any threats by the defendant to harm others or create a disturbance; (8) any evidence of self-destructive tendencies; (9) any risk of mob violence or attempted revenge by others; (10) the possibility of rescue attempts by co-offenders who are still at large; (11) the size and mood of the audience; (12) the layout and physical security of the courtroom; and (13) the availability of alternative remedies. The above principles have been codified in Illinois Supreme Court Rule 430, which provides that restraints may be used only if specific evidence considered on a case-by-case basis shows a manifest need to prevent escape or protect the security of the court or the proceedings.

2. The trial judge erred by failing to place on the record specific reasons for requiring the defendant to appear in prison attire and shackling defendant's legs and one hand. However, the plain error rule was inapplicable where defense counsel invited the error by stating that defendant's leg shackles could remain, asking that the hand shackles be removed to allow defendant to participate in trial by holding a pen, and accepting an arrangement by which only one of defendant's hands was unshackled. "By not asking for more, such as the removal of all shackles and prison attire, and in light of the deficiencies in the record [which did not show whether the hand which remained shackled was physically attached to anything], we view counsel's request as specifically limited to a request to remove enough items so that defendant could meaningfully participate in the trial." Under the invited error doctrine, a party may not ask to proceed in a certain manner and then contend on appeal that the course of action to which he agreed was erroneous.

Defendant's conviction for domestic battery was affirmed.

(Defendant was represented by Panel Attorney Carol Anfinson, Aurora.)

People v. Kelley, 2013 IL App (4th) 110874 (No. 4-11-0874, 4/5/13)

Under **People v. Boose**, 66 Ill.2d 261, 362 N.E.2d 303 (1977), a criminal defendant may not be shackled during court proceedings unless, after a hearing held outside the presence of the jury, the trial court finds that restraint is necessary. The Appellate Court held that **Boose** does not apply to third stage evidentiary hearings during post-conviction proceedings. Instead, the post-conviction court has discretion to order that a defendant be shackled.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. McCarron, 403 Ill.App.3d 383, 934 N.E.2d 76 (3d Dist. 2010)

Defendant wore an electronic monitoring device (EMD) on her ankle during her jury trial. She had been ordered to wear the device as a condition of her bond. The Appellate Court rejected the argument that the EMD was a physical restraint similar to shackles as it did not interfere with the defendant's ability to participate in her own defense. While the EMD could possibly have a negative effect on the jury's opinion of defendant, that possibility was addressed by the court's admonition to the jury, at the request of the defense, informing the jury that the EMD did not affect the presumption of defendant's innocence.

People v. Rippatoe, 408 Ill.App.3d 1061, 945 N.E.2d 132 (3d Dist. 2011)

Shackling a defendant prejudices the jury, negates the presumption of innocence, restricts the defendant's ability to assist counsel, and offends the dignity of the judicial process. Even where there is no jury, unnecessary restraint demeans both the defendant and the judicial process. Thus, shackling is to be avoided unless absolutely necessary.

The trial court may allow a defendant to be shackled only if it conducts a hearing at which it determines that restraint is manifestly necessary. Several factors are to be considered, including: (1) the seriousness of the charge, (2) defendant's temperament and character, (3) defendant's age and physical attributes, (4) defendant's past record, (5) any past attempts to escape or evidence of a present plan to escape, (6) any threats to harm others or cause a disturbance, (7) any self-destructive tendencies, (8) any risk of mob

violence or attempted revenge, (9) any possibility of rescue by offenders still at large, (10) the mood and size of the audience, (11) the nature and physical security of the courtroom, and (12) the adequacy and availability of alternative remedies.

Where the cause had been remanded for a new hearing on defendant's *pro se* claim that trial counsel had been ineffective, the trial court committed plain error by failing to conduct a **Boose** inquiry before allowing the proceeding to occur while the defendant was shackled. The court concluded that the failure to conduct a **Boose** hearing constitutes fundamental error which threatens the fairness of the proceeding. The court also noted that the defendant testified, questioned a witness, and addressed argument to the court while shackled to the extent that he had extreme difficulty raising his right hand to take an oath before testifying.

In rejecting the State's claim that the shackling did not influence the judge, the court found that shackles necessarily impose physical and mental burdens on a defendant and materially affect the process:

> Where a defendant is forced to appear *pro se*, take an oath, testify, question witnesses, and present his arguments to the court all while shackled, without any consideration by the trial judge of the necessity for the shackles, the integrity of the judicial process is greatly demeaned. There could be no doubt that the defendant's ability to act on his own behalf is severely diminished. Moreover, there can be no doubt that the integrity and dignity of the judicial proceedings was demeaned where one of the participants had to conduct himself throughout the hearing while bound hand and feet for no apparent reason and without even an inquiry into a need to be restrained.

The cause was reversed and remanded for further proceedings, including a determination by the trial judge whether shackling is necessary.

(Defendant was represented by Assistant Defender Charles Hoffman, Supreme Court Unit.)

People v. Williams, 2016 IL App (3d) 130901 (No. 3-13-0901, 4/26/16)

1. In general, the accused should not be shackled during court proceedings. **People v. Boose**, 66 Ill. 2d 261, 265, 362 N.E.2d 303 (1977). However, a defendant may be shackled where there is reason to believe that he may try to escape or that he might pose a threat to the safety of people in the courtroom, or if shackling is necessary to maintain order during the trial. Whether shackling is necessary is left to the discretion of the trial court, which should state the reasons for its decision on the record and give defense counsel a chance to respond. Although the possibility of prejudicing the jury is one factor to be considered, the reasons for forbidding shackling are not limited to trials by jury.

2. The court concluded that due process was violated where there was no indication that the trial court conducted a **Boose** analysis before ordering defendant to remain in shackles during trial. Where the evidence was closely balanced because the case was essentially a credibility contest between defendant and the complainant, the improper shackling constituted plain error.

3. The court noted a conflict in authority concerning the appropriate remedy where the defendant is improperly shackled during trial, and that some courts have approved holding a retrospective **Boose** hearing. The court found that such a hearing would be inappropriate here, however, because the court failed to conduct any analysis of the necessity for shackling and appeared to have a blanket policy of shackling. In addition, by granting defendant's motion to remove his shackles while testifying, the trial court impliedly decided that the shackles were unnecessary.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

Top

§52-4

Right to Present Argument

Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) Counsel may not be prohibited from making final summation, even in a bench trial. A state statute allowing the trial judge to deny summation in nonjury criminal cases violated the Sixth Amendment right to the assistance of counsel. See also, **People v. Smith**, 205 Ill.App.3d 153, 562 N.E.2d 553 (1st Dist. 1990).

People v. Withers, 87 Ill.2d 224, 429 N.E.2d 853 (1981) Defendant does not have an unqualified right to orally argue a motion for directed verdict; whether argument is allowed is a matter within the sound discretion of the trial judge. Although a trial judge would likely welcome argument in a long or difficult case, the judge did not abuse his discretion by refusing to hear argument where the charge was uncomplicated, the motion was made immediately after the State rested, and the State's case consisted of only three witnesses and 23 pages of testimony.

People v. McMullen, 300 Ill. 383, 133 N.E. 328 (1921) Trial judge's imposition of a 35-minute time limit for closing argument was unreasonable based upon the nature of the case, the evidence and the time required to make a fair presentation.

People v. Johnson, 45 Ill.2d 38, 257 N.E.2d 3 (1970) Where defendant requested and was allowed to make the final argument to the jury, the trial court did not err in refusing to permit defense counsel to make additional argument.

People v. Williams, 28 Ill.2d 114, 190 N.E.2d 809 (1963) Defense attorney has the right to argue an objection outside the presence of the jury.

People v. Owen, 299 Ill.App.3d 818, 701 N.E.2d 1174 (4th Dist. 1998) The trial judge has "vast discretion" concerning whether it will hear a motion in limine, and may refuse to consider such a motion at all, "instead requiring that the matter be presented and resolved at trial." But see, **Naperville v. Watson**, 175 Ill. 2d 399, 677 N.E.2d 955 (1997) (motions in limine are encouraged in criminal cases to exclude collateral or extraneous matters, but must be used cautiously to avoid depriving a defendant of a legally viable defense).

People ex rel. Paul v. Harvey, 9 Ill.App.3d 209, 292 N.E.2d 124 (1st Dist. 1972) Trial court must permit counsel to make record by presenting proper legal arguments for the record.

People v. Diaz, 1 Ill.App.3d 988, 275 N.E.2d 210 (1st Dist. 1971) The right to argue a cause in a criminal case is absolute, although the trial court has discretion to set reasonable limits on how the right shall be enjoyed.

People v. Hampton, 78 Ill.App.3d 238, 397 N.E.2d 117 (1st Dist. 1979) An opening statement should contain an outline of the facts that the party in good faith intends to prove. The opening statement should not be a long narrative or evidentiary recitation, and counsel is not permitted to relate the expected testimony at length. Although the trial court has discretion in regard to the scope and latitude of an opening statement, defendant has the right to present the facts that he intends to prove without unreasonable restrictions.

People v. DeRossett, 237 Ill.App.3d 315, 604 N.E.2d 500 (4th Dist. 1992) Supreme Court Rule 235 grants discretion to the trial court to decide whether opening arguments should be made at some point other than at the beginning of the trial, but does not authorize dispensing with arguments altogether.

People v. Kane, 81 Ill.App.3d 641, 401 N.E.2d 1310 (2d Dist. 1980) A trial judge may impose a reasonable

time limit on closing argument. Here, no error occurred where the trial judge imposed a one-hour time limit where there was little material evidence and the issues were not complex.

People v. Moczarney, 65 Ill.App.3d 410, 382 N.E.2d 544 (1st Dist. 1978) Trial court did not violate defendant's right to make a closing argument; defendant did not request such argument and there was no claim of prejudice.

People v. Stevens, 338 Ill.App.3d 806, 790 N.E.2d 52 (1st Dist. 2003) Where the trial court repeatedly interrupted defense counsel, showed impatience by saying "you got about two more minutes" and that counsel "overran the amount of time you took on the case to argue," and showed that it had prejudged the case before counsel completed his argument, the right to make a proper closing argument was denied.

Cumulative Digest Case Summaries **§52-4**

People v. Burnett, 237 Ill.2d 381, 930 N.E.2d 953 (2010)

No error occurred where: (1) defense counsel failed to appear for the hearing on a motion to reconsider the sentence, and (2) the trial court denied the motion in counsel's absence. (See **COUNSEL**, §§13-4(b)(9), (11)).

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Faint, 396 Ill.App.3d 614, 920 N.E.2d 1247 (3d Dist. 2009)

1. The trial court committed plain error where it pronounced defendant guilty upon denying a defense motion for a directed verdict at the end of the State's evidence, without giving defense counsel a chance to present evidence or a closing argument. "It is hard to imagine a better case in which to apply the second prong of a plain error analysis. We cannot have any confidence in the integrity of the trial court's finding of guilt or the judicial process . . . based on this truncated trial."

2. The court observed that it would have been difficult for defense counsel to object to the trial court's action - "the record conveys a sense that the judge would not have been receptive to defense counsel's suggestion that the approach adopted by the trial court was improper." Thus, "[c]ounsel adopted a prudent strategy by postponing the confrontation with the judge and electing to set out the error in the written motion for new trial to be considered on another day."

Justices Holdridge and Schmidt concurred in the judgment, but disagreed with the finding that defense counsel's failure to object was reasonable.

Defendant's conviction for driving under the influence was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Faria, 402 Ill.App.3d 475, 931 N.E.2d 742 (1st Dist. 2010)

The trial judge did not deny a fair trial by interrupting and challenging defense counsel's closing argument. Although a defendant has a constitutional right to present closing argument, the trial court has broad discretion to limit argument so long as the judge remains attentive, patient, and impartial. Because the trial judge allowed defense counsel to present a full closing argument which presented his theory of the case, the right to make a closing argument was not infringed.

Top

§52-5
Interpreters

People v. Shok, 12 Ill.2d 93, 145 N.E.2d 86 (1957) Whether to appoint an interpreter is normally within the discretion of the trial court. It is an abuse of discretion to refuse to appoint an interpreter who is necessary for a proper trial. Here, error occurred when defendant was denied an interpreter to assist in the cross-examination of one witness.

People v. Soldat, 32 Ill.2d 478, 207 N.E.2d 449 (1965) Trial court did not abuse discretion in failing, sua sponte, to provide an interpreter. Although the testimony of the witness was "broken and ungrammatical," it was understandable and its substance clear.

People v. Santillan, 138 Ill.2d 176, 561 N.E.2d 655 (1990) Statute requiring the county to pay for interpreters (Ch. 38, ¶165-13) is constitutional.

People v. Delgado, 10 Ill.App.3d 33, 294 N.E.2d 84 (1st Dist. 1973) Although an interpreter is required by statute to take an oath (Ch. 51, ¶47), the issue is waived if no objection is raised at trial.

People v. Starling, 21 Ill.App.3d 217, 315 N.E.2d 163 (1st Dist. 1974) Defendant was denied the right to confrontation by the trial court's appointment of an ineffective and incompetent interpreter. The complaining witness spoke only Spanish, and both defense counsel and the prosecutor complained repeatedly of the interpreter's ineffectiveness.

People v. Allen, 22 Ill.App.3d 800, 317 N.E.2d 633 (1st Dist. 1974) Although the trial court has discretion to determine the fitness of an interpreter, the court abused its discretion by appointing a close personal friend of the complainant as the interpreter. In addition, there was some indication that the interpreter may have been involved in the incident.

People v. DeJesus, 71 Ill.App.3d 235, 389 N.E.2d 260 (2d Dist. 1979) An interpreter's translation of testimony is not hearsay. The interpreter is merely a conduit for testimony and makes no statement of his or her own.

People v. Tomas, 136 Ill.App.3d 1054, 484 N.E.2d 341 (5th Dist. 1985) Trial court did not err by appointing a single interpreter to assist the non-English speaking defendants, translate the English testimony into Spanish for defendants, and translate the Spanish testimony to English for the court, jury and counsel. The interpreter sat beside defendants and was available to assist them in consulting with counsel.

People v. Escalante, 256 Ill.App.3d 239, 627 N.E.2d 1222 (2d Dist. 1994) The trial court erred by starting the trial of a Spanish-speaking defendant in the absence of the court-appointed interpreter. As a matter of plain error, a defendant who does not speak English is not "present" for purposes of the Sixth Amendment unless he is assisted by an interpreter.

People v. Williams, 331 Ill.App.3d 662, 771 N.E.2d 1095 (1st Dist. 2002) Due process and the right to confrontation were violated where the trial court failed to determine the extent of defendant's hearing impairment.

Top

§52-6

Continuances

People v. Wilson, 29 Ill.2d 82, 193 N.E.2d 449 (1963) Motion for continuance is addressed to sound discretion of the trial court, and cannot be said to have been improperly denied unless it appears that the lack of additional time prejudiced the accused in his defense.

People v. Walker, 232 Ill.2d 113, 902 N.E.2d 691 (2009) Whether to grant a continuance rests in the sound discretion of the trial court. Where it appears that the refusal of additional time prejudiced the defense, however, the conviction will be reversed. Factors which the trial court should consider in determining whether to grant a continuance include: (1) the movant's diligence, (2) defendant's right to a speedy, fair and impartial trial, (3) the interests of justice, (4) whether defense counsel has been unable to prepare for trial because he or she has been held to trial on another case, (5) the history of the case, (6) the complexity of the matter, (7) the seriousness of the charges, and (8) issues of docket management, judicial economy and inconvenience to the parties and witnesses.

As a matter of plain error, the trial court failed to exercise its discretion in ruling on defense counsel's request for a continuance. First, the record lacked any showing that the trial court considered the relevant factors. Second, there was no pattern of delay occasioned by defendant, defendant had not sought a change of counsel or judge and had cooperated with counsel, and defense counsel immediately informed the trial court that she had miscalendared the trial date and had just discovered her mistake.

In addition, counsel had been on trial the previous two days until 6 p.m. and 7:10 p.m. before another judge, and therefore was unable to prepare for defendant's trial after discovering the calendar error. Counsel repeatedly stated that she was not ready for trial, but the trial court deemed her statements "irrelevant" and held the trial later the same day. The trial judge asked no questions that might have provided information needed to exercise discretion on an informed basis.

People v. King, 66 Ill.2d 551, 363 N.E.2d 838 (1977) Trial court did not abuse its discretion in denying defense request for a continuance to locate certain witnesses; counsel already had one week to find the witnesses, and there was no showing that any effort had been made. Furthermore, counsel failed to indicate the identity of the witnesses, the materiality of their testimony, or the reasonable likelihood they could be found.

People v. Lott, 66 Ill.2d 290, 362 N.E.2d 312 (1977) Where a surprise State's rebuttal witness testified that defendant had admitted the crime, the trial court abused its discretion by denying a continuance for the purpose of obtaining possible witnesses. The testimony was totally unexpected, the defense had filed discovery motions and acted with reasonable diligence, and the surprise testimony had substantial probative value.

People v. Lewis, 165 Ill.2d 305, 651 N.E.2d 72 (1995) On the day trial was scheduled to begin, the State revealed that it had just learned that one of its witnesses had received psychiatric treatment approximately six years earlier. The defense received the psychiatric records of the witness on the following day, and requested a continuance to have the records examined by a defense expert. The trial court denied a continuance, but noted that the records would take only about five minutes to read and that the defense had time to submit the reports to a doctor of its choice.

Although the State's witness was important, his testimony merely supported evidence that would have provided a sufficient basis for the conviction in any event. For this reason, and because defense counsel cross-examined the witness on the same matters that would have been raised by an independent psychiatric witness, no reversible error occurred.

People v. Norris, 214 Ill.2d 92, 824 N.E.2d 205 (2005) Supreme Court Rules 504 and 505, which implement

a general policy against requiring multiple appearances by defendants charged with traffic offenses, do not guarantee that a traffic defendant will receive a trial on the merits at the first appearance date. Rules 504 and 505 do not preclude a trial court from granting a continuance because the arresting officer failed to appear.

People v. Hillsman, 329 Ill.App.3d 1110, 769 N.E.2d 1100 (4th Dist. 2002) The trial court did not abuse its discretion by denying a continuance so the State could research a speedy trial issue. A defendant who has been in custody for more than 120 days is entitled to discharge on the day of his scheduled trial. In addition, defense counsel had previously announced his intention to move for discharge, placing the State on notice that the issue would be raised.

People v. Davis, 147 Ill.App.3d 800, 498 N.E.2d 633 (1st Dist. 1986) Motion seeking additional time to secure witnesses may be properly denied where there is no reasonable expectation that the witnesses will be available in the foreseeable future.

People v. Johnson, 143 Ill.App.3d 122, 491 N.E.2d 918 (2d Dist. 1986) Trial judge did not abuse discretion by denying defendant's motion for a continuance where the motion was made on the first day of trial.

People v. Polk, 70 Ill.App.3d 903, 388 N.E.2d 864 (1st Dist. 1979) Trial judge did not abuse discretion in denying continuance to obtain a certain witness. No explanation was given for the witness's absence; in addition, the defense had not made an adequate attempt to secure the witness's testimony where it merely left a message for the witness to appear.

People v. Jackson, 72 Ill.App.3d 231, 390 N.E.2d 47 (1st Dist. 1979) Trial judge properly denied request for two-hour continuance to locate rebuttal witness - the defense had failed to act diligently to obtain the witness's presence.

People v. Jefferson, 35 Ill.App.3d 424, 342 N.E.2d 185 (1st Dist. 1975) The trial judge abused his discretion in denying a continuance where defense counsel explained why she was not prepared for trial and showed that she had exercised due diligence.

People v. Hamilton, 17 Ill.App.3d 740, 308 N.E.2d 216 (4th Dist. 1974) Error to deny continuance and force public defender to trial on the day he was appointed.

People v. Dixon, 26 Ill.App.3d 487, 325 N.E.2d 673 (1st Dist. 1975) Trial court committed reversible error in denying a continuance to public defender to prepare for a probation revocation hearing. The public defender was appointed when the petition was filed, but defendant desired to employ counsel on his own. Seven days later, on the hearing date, the public defender advised the court that defendant wanted more time to employ counsel. The court denied the request and ordered the hearing to proceed without giving the public defender time to prepare.

People v. White, 123 Ill.App.2d 102, 259 N.E.2d 357 (5th Dist. 1970) Where during jury selection the State disclosed 17 additional witnesses, the defense was entitled to a continuance so it could talk with the witnesses.

People v. Brown, 13 Ill.App.3d 277, 300 N.E.2d 831 (1st Dist. 1973) Error to deny continuance for defense to investigate State's list of 28 witnesses filed 20 days before trial; the State had delayed filing the list for 77 days.

People v. Mourning, 27 Ill.App.3d 414, 327 N.E.2d 279 (5th Dist. 1975) Trial court committed reversible

error by denying defense motion for continuance for purposes of discovery of witnesses. Although the State disclosed the names of its witnesses on the day before trial, it failed to furnish addresses. It "is inconceivable that one day before trial the State was unaware of the specific address of witnesses it intended to call the following day." The State's "misconduct" prevented the defense from properly preparing for trial.

People v. Timms, 59 Ill.App.3d 129, 375 N.E.2d 1321 (1st Dist. 1978) Trial judge erred in denying a defense request for a one-day continuance to allow three additional witnesses to testify. The defense had exercised due diligence in attempting to obtain the witnesses, who were not subpoenaed but were family members whom counsel reasonably expected to appear, and the anticipated testimony was material because it corroborated defendant's alibi.

People v. Morey, 308 Ill.App.3d 722, 721 N.E.2d 200 (2d Dist. 1999) The trial court abused its discretion in a drug case by denying a continuance for defense counsel to secure an informant's testimony. The defense had been diligent in attempting to secure the testimony; the informant was under a defense subpoena. However, the informant, who was present during the State's case-in-chief, left the courthouse despite the subpoena.

Further, the defense was prejudiced. The evidence was close, and the jury's verdict may have been different had defendant been able to present the informant's testimony. Also, the trial judge appeared to be "unduly motivated to finish the trial and to release the jury before the weekend."

Defendant did not waive the issue by failing to present an offer of proof concerning the informant's testimony. Requiring a defendant to present an offer of proof concerning the testimony of a confidential informant is "unrealistic and would burden the defendant with an insurmountable barrier." Also, the trial judge refused to allow counsel to present an offer of proof, and instead instructed her to rest her case. In addition, counsel told the trial court, as best she could, what she hoped to accomplish by calling the informant. Under these circumstances, the issue was adequately preserved for review.

People v. Bain, 4 Ill.App.3d 442, 280 N.E.2d 776 (2d Dist. 1972) Error to deny continuance and force student to trial while other student-witnesses were away from school on vacation.

People v. Dalzotto, 55 Ill.App.3d 995, 371 N.E.2d 859 (5th Dist. 1977) Trial court erred in denying defense counsel's request for a continuance to secure certain witnesses. Because two of the witnesses were eyewitnesses, the trial judge erred in holding that their testimony would be immaterial or irrelevant.

People v. McNeil, 102 Ill.App.2d 257, 243 N.E.2d 576 (1st Dist. 1968) Error to deny continuance where State chose to proceed on indictment other than the one originally selected, giving defendant only one-day notice prior to trial.

People v. Simpson, 24 Ill.App.3d 835, 321 N.E.2d 464 (4th Dist. 1974) Trial judge abused discretion in denying continuance for defense to have independent chemical analysis of substance. Although defendant was able to obtain a continuance by waiving his right to a jury trial, that waiver was not voluntary.

People v. Willis, 6 Ill.App.3d 980, 286 N.E.2d 72 (4th Dist. 1972) Error to deny continuance for defendant to obtain retained counsel in place of public defender, where defendant did all he could to contact such counsel.

People v. Reyes, 102 Ill.App.3d 820, 429 N.E.2d 1277 (1st Dist. 1981) After defendant was found guilty, the judge set sentencing for January 23, 1978, but on that date continued the case to January 30. Although the trial court had said that no further requests for continuances would be considered, on January 30 an attorney appeared and requested a continuance because defendant's trial counsel was on trial in federal court. The trial judge refused the request and held the sentencing hearing. The attorney appearing in place of trial

counsel stated that she was unfamiliar with the case and had nothing to present in mitigation. The denial of the continuance was an abuse of discretion.

People v. Martinez, 2011 IL App (2d) 100498 (No. 2-10-0498, 10/5/11)

Motions for continuances in criminal cases are governed by 725 ILCS 5/114-4. A continuance may be granted the State where a material witness is unavailable and the prosecution will be prejudiced by the absence of his testimony. 725 ILCS 5/114-4(c)(2). Subsection (f) provides: "After trial has begun a reasonably brief continuance may be granted to either side in the interests of justice." 725 ILCS 5/114-4(f).

The trial court abused its discretion in denying the State's request for a continuance. Although the State initially agreed to proceed with jury selection, the court was on notice when the case was first called that material witnesses for the State who were under subpoena were absent and might continue to be absent. The State filed a written motion for continuance due to the absence of its witnesses before the jury was sworn. Subsection (f) was thus inapplicable as trial had not yet commenced. Although the case had been pending for years, the State did not file its first motion for continuance until more than three years into the prosecution. The State was solely responsible for only five months of the total 46 months of delay. Because the State subpoenaed its witnesses for all of the trial dates, it was diligent. The court dismissed any defense complaints about delay, because defendant was responsible for most of the delay in the case. The State was not required to accept the court's proposal that it proceed with other witnesses while awaiting its absent witnesses. The scheduling of witnesses and the order in which they are called was up to the State, not the court. It was for the State to decide whether to risk that jeopardy would attach without its material witnesses ever appearing. The interests of justice would be better served by continuing the matter to allow the authorities to compel the presence of the material witnesses by force.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

Top

§52-7
Post-Trial Motions

People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 (2000) The Court rejected the State's argument that three issues had been waived because defendant's post-trial motion was filed 32 days after the convictions. The issues had been ruled on by the trial court while it had jurisdiction over the case, and involved potential and substantial prejudice to the defense.

People v. Holtzman, 1 Ill.2d 562, 116 N.E.2d 338 (1954) Motions for new trial based on newly discovered evidence are not favored, and the burden of proof lies with the applicant. Whether such a motion should be granted is left to the discretion of the trial judge, whose ruling will not be disturbed except in a case of manifest abuse.

Newly discovered evidence that discredits, contradicts or impeaches a witness does not afford a basis for a new trial. Newly discovered evidence that shows different facts may justify a new trial if a different result would likely occur at the new trial.

People v. Reese, 54 Ill.2d 51, 294 N.E.2d 288 (1973) To warrant the granting of a motion for new trial based on newly discovered evidence, that evidence must be of such conclusive character that it will probably change the result on retrial.

People v. Molstad, 101 Ill.2d 128, 461 N.E.2d 398 (1984) Defendant and five codefendants were convicted of criminal damage to property and aggravated battery arising out of an incident in which several individuals attacked a car with baseball bats and lead pipes. One of the three passengers in the car identified defendant as being involved. No other witness identified him, and he denied having been present.

Before sentencing, defendant's lawyer filed a post-trial motion that included affidavits of the five codefendants, stating that defendant was not present during the incident.

To warrant a new trial on the basis of additional evidence, the evidence must: (1) appear to be of such a conclusive character that it will probably change the result if a new trial is granted, (2) have been discovered since the trial, (3) be such that it could not have been discovered before trial by the exercise of due diligence, (4) be material to the issue, and (5) not merely be cumulative of the evidence offered at trial. Here, defendant was entitled to a new trial:

1. The testimony of the codefendants was newly discovered; the affidavits were not prepared until after trial, and the codefendants did not present the testimony at trial because it would have incriminated them.

2. The testimony could not have been discovered by due diligence, because the codefendants could not have been forced to incriminate themselves.

3. The evidence was material because it went to the ultimate issue in the case — who was present during the incident.

4. The testimony was not cumulative. "Claiming evidence is cumulative involves a determination that such evidence adds nothing to what is already before the jury".

5. A different result is probable if the trier of fact considers the testimony of the codefendants that defendant was not present.

People v. Steidl, 142 Ill.2d 204, 568 N.E.2d 837 (1991) Defendant filed a §2-1401 petition based upon the alleged recantations of trial testimony by three State witnesses. The trial court did not abuse its discretion by denying the petition. All three of the witnesses testified at the post-trial hearing that their testimony at trial had been truthful. Furthermore, the conditions under which the recantations were made were less than ideal - one witness's statements were made in response to leading questions, there were several off-the-record conversations, and the court reporter who was present refused to sign an affidavit stating that the defense attorneys did not speak with the witness during the off-the-record conversations. In addition, statements given to defense attorneys by two of the witnesses were suspect because neither witness was represented by counsel and no representative of the State's Attorney's office was present.

People v. Lutz, 73 Ill.2d 204, 383 N.E.2d 171 (1978) A motion in arrest of judgment (Ch. 38, ¶116-2) may be granted where the court lacks jurisdiction or the indictment, information or complaint fails to charge an offense.

People v. Whitehead, 35 Ill.2d 501, 221 N.E.2d 256 (1966) The requirement that a motion for new trial be in writing and list the specific grounds relied upon is waived where the State fails to object to a non-specific oral motion for a new trial. In such a case, defendant is not precluded on appeal from raising any error which might appear in the record, even though that issue was not specified in the oral post-trial motion.

People v. Caballero, 102 Ill.2d 23, 464 N.E.2d 223 (1984) A written post-trial motion is important. Defense counsel has an obligation to comply with the statute requiring a written motion, and the prosecutor has an obligation to object to general oral statements made by defense counsel that may be viewed as an oral motion for a new trial.

People v. Yarbrough, 93 Ill.2d 421, 444 N.E.2d 493 (1982) Immediately after the verdict was returned, the trial judge suggested that defendant undergo a polygraph examination. During argument at the hearing on

defendant's post-trial motion (claiming, inter alia, that the evidence was insufficient to convict), the trial judge asked the prosecutor if there was any "new evidence subsequent to the trial that would . . . be beneficial to the defendant." The prosecutor replied that "certain investigative procedures were performed subsequent to trial . . . [but] there is no new evidence available to the defendant." The trial judge then denied the post-trial motion.

The trial judge erred by referring to a lie detector test. A defendant is entitled to "an objective and unbiased appraisal of the points he raises in his post-trial motion . . . [and] to have his post-trial motion." Because the trial judge must have had some concern about the sufficiency of the evidence (or he would not have asked about the polygraph), the conviction must be reversed and the cause remanded for a new trial.

People v. Kellick, 102 Ill.2d 162, 464 N.E.2d 1037 (1984) Defendant was convicted of murder and sentenced to death. Defendant testified that he went to the crime scene with his father, who killed the victim without defendant's knowledge. In his post-trial motion, defendant presented a statement from a witness who had been across the street from the crime scene and who said that defendant was accompanied by an older male. However, the witness could not identify defendant's father as the companion.

The witness's statement "does not confirm defendant's testimony that this other man was his father." Even had the witness identified the man as defendant's father, there was a substantial amount of other evidence indicating that the father was elsewhere at the time of the murder. Under these circumstances, the trial court did not abuse its discretion by concluding that the statement would not have changed the verdict.

People v. Miller, 79 Ill.2d 454, 404 N.E.2d 199 (1980) The trial judge did not err by denying defendant's motion for a new trial after hearing a witness's admission that he, and not defendant, committed the offense. The trial judge could reasonably conclude that the newly discovered testimony was merely cumulative and would not have changed the result of the trial.

People v. Logan, 72 Ill.2d 358, 381 N.E.2d 264 (1978) The alleged perjury of a witness at trial was not newly discovered evidence where defendant would have been aware of the perjury when the witness testified.

People v. Nash, 36 Ill.2d 275, 222 N.E.2d 473 (1967) Trial court did not err in denying motion for new trial despite a witness's affidavit recanting his testimony against defendant. Recantation by a witness does not necessarily entitle a defendant to a new trial; recanted testimony is very unreliable, and a court will usually deny a new trial motion based on that ground unless it is satisfied that the testimony is true.

People v. Jones, 349 Ill.App.3d 255, 812 N.E.2d 32 (3d Dist. 2004) Although an appellate court must generally dismiss an appeal when defendant has failed to follow Rule 604(d) by filing a timely motion to reconsider the sentence or to withdraw the guilty plea, the "admonition exception," under which appellate courts may entertain appeals in which the trial court failed to issue proper Rule 605 admonitions, should be applied where there was a bona fide doubt of defendant's fitness at the time he received the admonitions. "It seems but a small step from an exception for no admonitions at all to an exception for admonishments given to an unfit defendant who cannot understand or comply with them."

People v. Polk, 349 Ill.App.3d 760, 812 N.E.2d 675 (1st Dist. 2004) Where defendant alleged that his sentence was excessive and that inadequate admonishments precluded him from filing a motion to reconsider the sentence, the cause should be remanded for proper Rule 605(a) admonishments.

People v. Elders, 349 Ill.App.3d 573, 812 N.E.2d 649 (1st Dist. 2004) Although various districts of the

Appellate Court have disagreed whether "strict" or "substantial" compliance with Rule 605 is required, the court held that the admonishments here were insufficient to comply even substantially with the rule.

People v. Wyatt, 305 Ill.App.3d 291, 712 N.E.2d 343 (2d Dist. 1999) Although a motion to reconsider sentence must be filed within 30 days after sentencing, a court may grant a continuance if required by the interests of justice. Here, defense counsel needed additional time to communicate with defendant, who had been sent to the Department of Corrections, and the trial judge granted a continuance within 30 days after sentencing.

People v. Levesque, 256 Ill.App.3d 639, 628 N.E.2d 272 (1st Dist. 1993) After he was convicted of robbery, defendant filed a pro se motion challenging the effectiveness of defense counsel's representation. The pro se motion was filed thirty-six days after the conviction.

Defendant had been ready to file the motion within thirty days, but acquiesced in the trial judge's request to discuss his complaints with trial counsel before filing the motion. Because the motion would have been timely had defendant been allowed to file it when he first attempted to do so, "it would constitute a grave injustice . . . to hold the defendant, by following the wishes of the circuit court, has waived the issues raised in his post-trial motion."

People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2d Dist. 2005) The trial judge erred by summarily denying an untimely pro se post-trial motion alleging ineffective assistance of counsel. The trial court has authority to consider an untimely post-trial motion so long as it retains jurisdiction over the cause. Here, the trial court had jurisdiction because a motion to reconsider sentence was pending.

People v. Raibley, 338 Ill.App.3d 692, 788 N.E.2d 1221 (4th Dist. 2003) Issues raised on appeal were not waived solely because defendant's post-trial motion was filed more than 30 days after his conviction. By responding to the merits of the motion in the trial court without claiming that the motion was untimely, the State waived any issue of timeliness.

People v. Stanbridge, 348 Ill.App.3d 351, 810 N.E.2d 88 (4th Dist. 2004) Although the State asserted on appeal that defendant's motion for new trial had been untimely, and therefore constituted a waiver of the issue raised on appeal, the State forfeited the waiver issue where it chose, in the trial court, to argue the untimely motion on the merits.

People v. Serio, 357 Ill.App.3d 806, 830 N.E.2d 749 (2d Dist. 2005) The trial court has jurisdiction to rule on a successive post-judgment motion that is filed within 30 days after the ruling on a preceding post-judgment motion. Under such circumstances, jurisdiction does not vest in the Appellate Court until the trial court disposes of the successive motion and a timely notice of appeal is filed.

Because defendant's pro se motion alleging ineffective assistance of counsel was filed within 30 days after the denial of defense counsel's motion to reconsider the sentence, the trial court had jurisdiction.

People v. Harper, 347 Ill.App.3d 499, 807 N.E.2d 1001 (5th Dist. 2004) Defendant was convicted in a bench trial of first degree murder, and filed a timely post-trial motion. After the motion was denied, new counsel entered the case and moved to reconsider the denial. The motion to reconsider was filed more than three months after trial and alleged several additional grounds, including that new evidence and occurrence witnesses had been discovered.

Although new counsel captioned the motion as one to reconsider, in fact it was a second motion for a new trial raising issues that had not been previously considered. A trial court has discretion to deny leave to file a motion for a new trial that is presented more than 30 days after trial, but also has discretion to consider such a motion. In addition, a trial judge has authority to grant a new trial until such time as defendant is sentenced.

Also, the court rejected the State's argument that because defendant had other avenues for post-judgment or post-conviction review, he suffered no prejudice when the trial court refused to consider his second post-trial motion:

> "This assertion ignores the fact that the safeguards against frivolous petitions may create additional obstacles on the road to reaching a just decision in this case. Giving the trial court discretion to entertain a motion for a new trial when the court retains jurisdiction on other grounds is in line with the purpose of the Code to provide an orderly process for the review of claims that alleviates delay and expense to the judicial system."

People v. Lamb, 265 Ill.App.3d 10, 638 N.E.2d 1203 (2d Dist. 1994) A trial court has discretion to enter an acquittal at the post-trial motion stage, and such an order cannot be appealed by the State. Since the trial court erroneously believed that it had no power to enter an acquittal, and clearly would have done so had it realized its authority, the conviction was reversed outright.

People v. Moczarney, 65 Ill.App.3d 410, 382 N.E.2d 544 (1st Dist. 1978) Trial court did not err by refusing to allow argument on defendant's motion for new trial. The trial was short and involved only simple issues.

People v. Villereal, 201 Ill.App.3d 223, 559 N.E.2d 77 (1st Dist. 1990) Defendants were convicted of aggravated battery based on a police officer's testimony that he was attacked by defendants, who took his gun. The officer testified that he grabbed the cylinder of his revolver so that it misfired, causing the firing pin to leave a "dimple" on the back of the cylinder instead of striking the cartridge. Defendants testified that they grabbed the officer's gun after he shot and killed their brother for no reason except that the brother swore. In the course of its deliberations the jury asked for the revolver, which was sent to the jury room.

The post-trial motion alleged newly discovered evidence, and included an expert's affidavit that the "dimple" was merely a manufacturing mark and that the design of the gun prevented the firing pin from striking the cylinder. The trial judge abused its discretion by denying defendant's post-trial motion. The new evidence tended to show that the officer's testimony was at least partially false. In addition, since the jury asked to see the gun during deliberations, it must have considered the officer's testimony about the gun to be important.

People v. Coleman, 301 Ill.App.3d 37, 704 N.E.2d 690 (1st Dist. 1998) Where laboratory reports indicated that only 7.02 grams of the substance seized from defendant had been tested for heroin, trial counsel was ineffective for stipulating that defendant possessed 70.2 grams of heroin. In addition, the trial court abused its discretion by denying defendant's post-trial motion to vacate the stipulation.

Although stipulations are proper because they tend to promote the disposition of cases, a party may be relieved from a stipulation upon a "seasonably made" application and a clear showing that the stipulated matter is untrue. Here, it would have been appropriate to vacate the stipulation because the defense attorney was ineffective and because, without the stipulation, the State may have lacked evidence to prove an enhanced offense.

People v. Nestrock, 316 Ill.App.3d 1, 735 N.E.2d 1101 (2d Dist. 2000) The court rejected the State's argument that the Rights of Crime Victims and Witnesses Act (725 ILCS 120/1) and Art. I, §8.1 of the Illinois Constitution (the Crime Victims' Rights Amendment) require that in deciding whether a new trial is required, defendant's rights must be balanced against the victims' rights:

> "This court certainly feels sympathy for the victims' grievous loss. However, as the State well knows, courts must base their decisions on the law, not on sympathy. At the risk of stating the obvious, the Act and the

amendment do not alter the fundamental principles on which our legal system is based. Those principles mandate that a conviction based on illegally obtained, inadmissible evidence cannot stand."

People v. Flemming, 2014 IL App (1st) 111925 (No. 1-11-1925, 8/15/2014)

When a defendant alleges his counsel's ineffectiveness in a *pro se* motion for a new trial, the court should conduct a **Krankel** hearing to examine the factual matters underlying defendant's claim to determine whether new counsel should be appointed. **People v. Krankel**, 102 Ill. 2d 181 (1984); **People v. Nitz**, 143 Ill. 2d 82 (1991).

The operative concern in a **Krankel** hearing is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations. If the court determines that the claims lack merit it does not need to appoint new counsel. If the court finds that the claims show possible neglect, the case proceeds to the second step in a **Krankel** hearing, an adversarial proceeding in which new counsel must be appointed to represent defendant on his claim of ineffectiveness.

Here, defendant made an oral *pro se* motion alleging that his counsel was ineffective for failing to present evidence supporting his theory of defense. After hearing defendant's allegations, the court did not directly question or otherwise interact with defense counsel. Instead, the court directed the prosecutor to question defense counsel about defendant's allegations. After hearing defense counsel's answers, the court denied defendant's motion.

On appeal, defendant argued that the trial court failed to conduct a proper judicial inquiry "one-on-one style" with defendant and counsel, and instead conducted a full-blown adversarial hearing where defendant had no representation. Defendant argued that the trial court improperly compressed the two steps in a **Krankel** hearing but failed to properly execute either of them.

The Appellate Court rejected this argument. It held that the prosecutor's questioning of defense counsel was not a full-blown second-stage adversarial hearing. Instead, the questioning was conducted at the court's direction, was very brief, and directed solely at answering defendant's allegations. Such questioning was clearly a preliminary inquiry designed to give the court information about defendant's claims in order to decide whether new counsel should be appointed.

The fact that the trial court did not personally question defense counsel did not make this an improper hearing. There is no set format for conducting the initial inquiry in a **Krankel** hearing. Some interchange between the court and counsel is permissible and usually necessary, but the trial court's method of inquiry is somewhat flexible. Moreover, the State's participation here was *de minimis* and was not enough to turn this into an adversarial proceeding.

The trial court's decision not to appoint new counsel was affirmed.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

People v. Flemming, 2014 IL App (1st) 111925-B (No. 1-11-1925, 5/1/2015)

1. When a defendant alleges his counsel's ineffectiveness in a *pro se* motion for a new trial, the court should conduct a **Krankel** hearing to examine the factual matters underlying defendant's claim to determine whether new counsel should be appointed. **People v. Krankel**, 102 Ill. 2d 181 (1984); **People v. Nitz**, 143 Ill. 2d 82 (1991).

The operative concern in a **Krankel** hearing is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations. If the court determines that the claims lack merit it does not need to appoint new counsel. If the court finds that the claims show possible neglect, the case proceeds to the second step in a **Krankel** hearing, an adversarial proceeding in which new counsel must be appointed to represent defendant on his claim of ineffectiveness.

2. Here, defendant made an oral *pro se* motion alleging that his counsel was ineffective for failing to present evidence supporting his theory of defense. After hearing defendant's allegations, the court did not directly question or otherwise interact with defense counsel. Instead, the court directed the prosecutor to question defense counsel about defendant's allegations. After hearing defense counsel's answers, the court denied defendant's motion.

On appeal, defendant argued that the trial court failed to conduct a proper judicial inquiry "one-on-one style" with defendant and counsel, and instead conducted a full-blown adversarial hearing where defendant had no representation. Defendant argued that the trial court improperly compressed the two steps in a **Krankel** hearing but failed to properly execute either of them.

3. The Appellate Court rejected defendant's argument that the prosecutor's questioning of defense counsel was a full-blown second-stage adversarial hearing. The questioning was conducted at the court's direction, was very brief, and directed solely at answering defendant's allegations. Such questioning was clearly a preliminary inquiry designed to give the court information about defendant's claims in order to decide whether new counsel should be appointed.

Additionally, the fact that the trial court did not personally question defense counsel did not make this an improper hearing. There is no set format for conducting the initial inquiry in a **Krankel** hearing. Some interchange between the court and counsel is permissible and usually necessary, but the trial court's method of inquiry is somewhat flexible.

4. But, if the State's participation during the preliminary inquiry is anything more than *de minimis*, there is an unacceptable risk that the inquiry will become an improper adversarial proceeding with both the State and trial counsel opposing defendant. The purpose of **Krankel** is best served by having a neutral trier of fact evaluate the claims without the State's adversarial participation. When the State questions defendant's trial counsel in a manner contrary to defendant's allegations, the State's participation is not *de minimis* and is reversible error. **People v. Jolly**, 2014 IL 117142.

Here, although the State's participation was minimal, its questioning of defense counsel tended to counter defendant's allegations. Such questioning was contrary to the intent of a preliminary **Krankel** inquiry and was reversible error.

The case was remanded for a new preliminary **Krankel** hearing before a different trial judge and without the State's adversarial participation.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

People v. Patrick, 406 Ill.App.3d 548, 956 N.E.2d 443 (2d Dist. 2010)

The trial court has jurisdiction to consider a successive post-judgment motion where the successive motion is filed within 30 days of the final disposition of preceding post-judgment motion.

Defendant filed a *pro se* motion alleging ineffective assistance of counsel 119 days after the jury's verdict and 40 days after sentencing. But a timely-filed motion to reduce sentence was pending at the time defendant filed his motion. Therefore the court had jurisdiction to consider the *pro se* motion.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Shines, 2014 IL App (1st) 121070 (No. 1-12-1070, 2/4/15)

More than 30 days after he had been sentenced, defendant filed a *pro se* letter titled "motion of appeal" in the trial court alleging that counsel had been ineffective. The trial court took no action on the letter. The Illinois Supreme Court eventually granted defendant's motion for supervisory order directing the Appellate Court to allow defendant's letter "to stand as a validly filed notice of appeal."

1. Defendant argued on appeal that the trial court failed to conduct a **Krankel** hearing on defendant's *pro se* claims of ineffectiveness. The Appellate Court held that since defendant's letter was filed more than 30 days after the final judgment, the trial court no longer had jurisdiction to rule on defendant's claims.

A trial court generally loses jurisdiction 30 days after the entry of a final judgement. Here the court entered the final judgment on March 7 when it sentenced defendant and lost jurisdiction on Friday, April 6.

Defendant filed his letter on Monday, April 9, more than 30 days after the final judgment had been entered.

2. The Appellate Court rejected defendant's argument that the letter was filed within 30 days under the mailbox rule. Under that rule, pleadings are timely filed on the day an incarcerated defendant places them in the prison mail system. Defendant argued that his letter was timely because it was filed on Monday, April 9, and thus with no Sunday mail, it could only be untimely if it had been placed in the prison mail system on Saturday, April 7 and then delivered halfway across the State by Monday, April 9, an impossible scenario.

The mailbox rule, however, does not permit such speculation. Instead, the rule requires a defendant to provide proof of mailing by filing a proof of service with "an affidavit stating the time and place of mailing, the address on the envelope, and the fact that proper postage was prepaid." Since defendant did not file such an affidavit with his letter, he could not utilize the mailbox rule.

3. The court refused to take judicial notice of an affidavit submitted with defendant's motion for supervisory order. The affidavit, attached as an exhibit to defendant's reply brief, was from a paralegal who averred that a manager at the prison where defendant was incarcerated informed her that defendant's letter was mailed on April 3. The court held that it could not properly consider attachments to briefs that were not included in the record. Additionally, the content of the affidavit was entirely hearsay and thus insufficient to establish the date of mailing.

4. Defendant also argued that since the paralegal's affidavit was attached to the motion for a supervisory order, which was uncontested by the State and granted by the Supreme Court, the issue of when the letter was mailed had already been litigated and decided, and cannot be relitigated now. The supervisory order, however, did not reflect that the Supreme Court decided when the letter was mailed or whether it was timely filed in the trial court. The Supreme Court merely allowed the letter to serve as a validly filed notice of appeal.

Defendant's letter was therefore not timely filed and the trial court had no jurisdiction to consider his allegations of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

Top